APPENDIX

Supreme Court, U. S.
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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

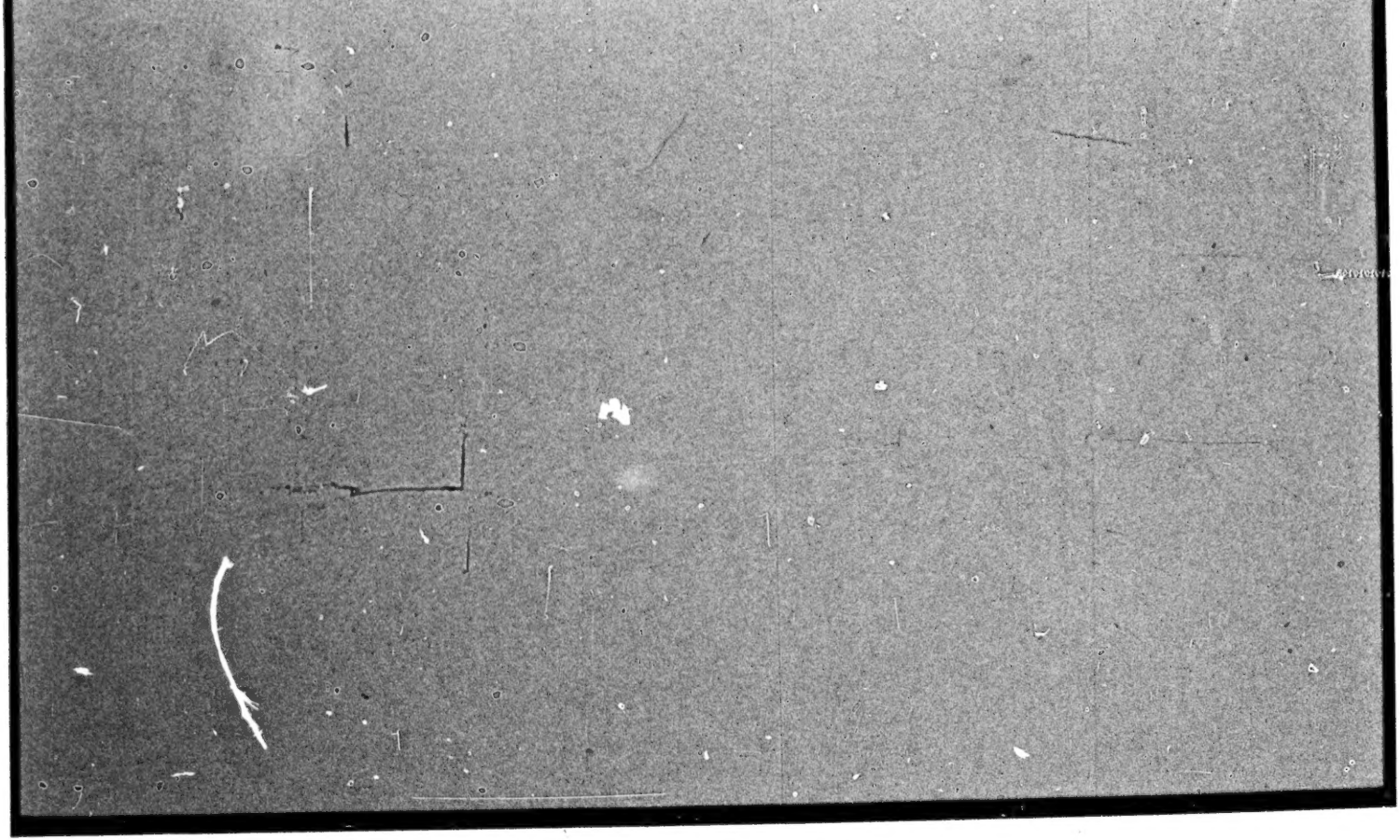
—v.—

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 5, 1974; CERTIORARI AND FORMA PAUPERIS GRANTED MAY 13, 1974.



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IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 405R

STATE OF MISSOURI, PLAINTIFF

vs.

JAMES E. DROPE, DEFENDANT

RELEVANT DOCKET ENTRIES

1969	
February 26	Indictment filed.
April 14	Cause continued for defendant James E. Drope to May 26, 1969.
May 27	Defendant files motion for psychiatric examination. State of Missouri files memorandum stating it does not oppose the motion for a psychiatric examination of defendant James E. Drope.
June 23	Cause assigned to Division No. 19 for trial. Defendant present in court, but his attorney, Lester Watson, was not present. State present by Mike Frank. Cause having been assigned to Division No. 19 and the court having waited from 10:45 a.m. to 2:00 p.m. and the defendant having been present and a panel of 60 jurors present and Lester Watson having failed to appear and the court being advised that Lester Watson is aware of the case being on today's docket, it is ordered that Sheriff seek out the said Lester Watson at this time. Lester Watson arrives at 3:15 p.m. Defendant present in court with his attorney, Lester Watson. State by Mike Frank. Examination of jurors voir dire begun. Not completed. Cause recessed until Tuesday, June 24, 1969 at 10:00 a.m.

Relevant Docket Entries

1969

June 24 — Trial proceeds. Defendant present in court with his attorney, Lester Watson. State by Mike Frank. Examination of jurors voir dire begun, continued and selected. Jury sworn. Instruction given. Opening statement made by the State. Defense reserves the right to make opening statement at this time. Testimony for State begun, not completed. Trial recessed until Wednesday, June 25, 1969 at 9:30 a.m.

June 25 — Trial proceeds. Defendant not present in court with his attorney, Lester Watson. The court being informed that the defendant James E. Drope is in the hospital as the result of a self-inflicted gunshot wound. Defendant's attorney, Lester Watson, moves for a mistrial which was overruled. Trial proceeds with defendant, James E. Drope, not present. Trial progressed. Testimony for State being heard and completed. Out of the hearing of the jury defendant's prior conviction read by the court clerk. The court finds defendant's prior convictions. Defendant's attorney files motion for verdict of acquittal. Presented and overruled. Jury instructed not to separate. Instructions read. Arguments of counsel made. Sheriff sworn and cause given to the jury. Verdict of the jury. Guilty of rape. Verdict received. Jury polled. Defendant ordered to custody of Sheriff. Defendant was in the hospital when remanded to Sheriff. Defendant's bond set at $25,000.

July 21 — In accordance with the verdict of the jury and court's findings the punishment of defendant is assessed at imprisonment in the penitentiary for the remainder of his natural life.

July 30 — Defendant's motion for a new trial filed. Set for hearing on September 19, 1969.

RELEVANT DOCKET ENTRIES

1969	
September 19	Evidence offered by defendant on motion for new trial. Further proceedings to be heard by court on October 3, 1969.
October 3	Motion on hearing for new trial heard and to be taken as submitted on filing of last brief. Defendant allowed 10 days to file and state allowed 5 days to answer.
October 15	Defendant's motion for new trial overruled and sentencing set for Tuesday, October 21, 1969 at 9:15 a.m.
October 21	Allocution granted. Defendant sentenced to Department of Corrections for remainder of his natural life.
1970	
March 12	Defendant with special leave of Court, files notice of appeal to Supreme Court of Missouri.
1971	
January 11	Opinion of Supreme Court of Missouri affirming judgment filed.

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Case No. PCR 294

JAMES EDWARD DROPE, MOVANT

vs.

STATE OF MISSOURI, RESPONDENT

RELEVANT DOCKET ENTRIES

1971	
April 22	Defendant's affidavit in forma pauperis is filed and granted. Motion to set aside judgment and sentence under Supreme Court Rule 27.26 is filed and assigned to Division No. 19 as Case P.C.R. Number 294 to be heard by Judge David McMullan. Richard D. Hatton appointed attorney for movant.
April 28	Appointment of Richard D. Hatton set aside. Elmer H. Grimm appointed attorney for movant.
May 11	Appointment of Elmer H. Grimm set aside and John J. Goebel appointed attorney for movant.
May 14	Charles A. Weiss enters his appearance as co-counsel with John J. Goebel as appointed attorney for movant.
July 21	PCR hearing convened and progresses. Continued for purpose of taking and filing deposition. Defendant granted 30 days for filing brief. State granted 30 days to answer. Motion to be taken as submitted on filing of last brief.
1972	
June 26	Movant's motion filed pursuant to Missouri Supreme Court Rule 27.26 overruled. Findings of fact, conclusions of law and ruling filed.
July 7	Movant files notice of appeal to Missouri Court of Appeals, St. Louis District.

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT

No. 34,797

JAMES EDWARD DROPE, APPELLANT

v.

STATE OF MISSOURI, RESPONDENT

RELEVANT DOCKET ENTRIES

1973	
March 5	Cause argued and submitted.
June 5	Opinion filed upholding finding of Circuit Court in overruling appellant's motion filed pursuant to Missouri Supreme Court Rule 27.26.
June 15	Appellant's motion for rehearing or to transfer to Missouri Supreme Court filed.
August 16	Appellant's motion for rehearing or transfer to Missouri Supreme Court denied.
September 13	Copy of appellant's application for transfer to Supreme Court of Missouri filed.
October 9	Supreme Court of Missouri's order denying appellant's application to transfer filed.
1974	
January 7	Letter filed notifying court that appellant filed with the United States Supreme Court a petition for writ of certiorari to Missouri Court of Appeals, St. Louis District.

"CIRCUIT COURT, CITY OF ST. LOUIS,
FEBRUARY TERM, 1969

INDICTMENT—Filed February 26, 1969

"THE GRAND JURORS OF THE STATE OF MISSOURI, within and for the body of the City of St. Louis, now here in Court, duly impaneled, sworn and charged, upon their oath present, That JAMES EDWARD DROPE alias EDWARD DROPE on the 2nd day of June, one thousand nine hundred and fifty-eight, at the City of St. Louis aforesaid, in the Circuit Court was duly convicted of the offense of Burglary Second Degree and Stealing, and in accordance with said conviction was duly sentenced by said Court to an imprisonment in the Penitentiary of the State of Missouri for the term of two years for Burglary Second Degree and two years for Stealing to run consecutively for a total of four years and was duly imprisoned in the said Penitentiary of the State of Missouri aforesaid, on July 2, 1958, in accordance with said sentence; and that the said JAMES EDWARD DROPE alias EDWARD DROPE was duly discharged from said Penitentiary of the State of Missouri aforesaid, on February 25, 1961, after and upon lawful compliance with said sentence.

"THE GRAND JURORS OF THE STATE OF MISSOURI, within and for the body of the City of St. Louis, now here in Court, duly impaneled, sworn and charged, upon their oath present further as follows:

"That JAMES EDWARD DROPE alias EDWARD DROPE, RABORN EUGENE TUTTLE and ROGER DERYL BUTLER at the City of St. Louis, State of Missouri, on the 17th day of January, 1969, did unlawfully and feloniously make an assault upon MARY JOYCE DROPE, a female over the age of sixteen years and did then and there unlawfully, feloniously and forcibly rape, ravish and carnally know the said MARY JOYCE DROPE against her will; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

[Caption Omitted in Printing]

MOTION FOR CONTINUANCE

Comes now the Defendant, JAMES E. DROPE, and states to the court that he has had a psychiatric examination made by Dr. Joseph F. Shuman, M. D., a copy of which report is attached hereto.

Defendant moves the court to continue his case until September, 1969 in order that he might receive an Examination, Evaluation and psychiatric treatment, as suggested by Dr. Shuman, at the Malcomb Bliss Hospital in the City of St. Louis, Missouri.

/s/ Lester Watson
Attorney for Defendant
1212 Big Bend Blvd.
Richmond Heights, Mo. 63117
647-6330

JOSEPH S. SHUMAN, M. D.
ANTON F. HEUSLER, M. D.
NEUROPSYCHIATRY
326 Northland Medical Bldg.
St. Louis, Mo. 63136

Telephone CO 1-9310

February 22, 1969

Lester Watson, Esq.
Attorney at Law
1212 Big Bend Boulevard
Richmond Heights, Missouri
63117

Re: James E. Drope

Dear Mr. Watson:

Pursuant to your request I performed a psychiatric evaluation on Mr. James E. Drope in my office on February 20th, 1969. Mr. Drope had been driven to my office by his wife. This was a healthy looking, well built, well developed white male, who appeared to be markedly agitated. The patient at times would wring his hands. He had difficulty in talking because of his marked anxiety.

Mr. Drope explained that one day he came home from the union hall, after not having gotten any work and he started drinking; apparently, he spent the day drinking. He said that he got home at 3:30 p.m. and went to sleep. His wife woke him at 6:00 p.m. and sent him to the store, but after buying his groceries he also went to the tavern for a few drinks and also got himself a six-pack. He said that he started drinking and then was joined by a few men aged twenty to twenty-two. They, apparently, drank with him until about 2:30 a.m. He said they had been talking about going over to East St. Louis and finding some girls. Mr. Drope then claimed that the next part of the history is really a blank to him. He repeats what he has been told, but claims that he has absolutely no memory for it. He says that all he remembers is that he was bringing the groceries upstairs when he saw some police come into the street and

up around his house and they arrested him after his wife screamed to them to watch out for him because he was carrying a gun. Mr. Drope said that he doesn't remember anything, but he was told that he and the four men with him went to his home and raped and threatened his wife with a gun and a knife and that this occured between 2:30 and 4:00 a.m.

Mr. Drope said that he was taken to the hospital and was examined and then he was taken to the jail and eventually to the City Workhouse. He said that there were several warrants against him. After being in the workhouse for one or two weeks he was let out on bond. He said that he has been trying to work since then. He also said that his wife wants to drop the charges, but that he is due back in court on February 26th. He said that he and his wife are now getting along okay.

PAST HISTORY: Mr. Drope was born in Gideon, Missouri, on April 29th, 1937, the second of five children. The youngest three were the product of a different father. Mr. Drope said that he has seen his father only four times in his life. Apparently, his father was divorced by his mother when Mr. Drope was still only a baby. A stepfather raised him, but he died in 1952. The mother has since remarried several times and is now with her fourth husband.

Mr. Drope said that he was shunted back and forth to many cities and schools and he finally quit school in the fourth grade when he was fifteen or sixteen years old. This occured after his stepfather died and he had to go to work. He was living in St. Louis at the time. He had numerous jobs such as being a newspaper boy, a delivery boy, a packer, etc.

Mr. Drope first married at the age of seventeen and was divorced at the age of twenty-three. He and his wife had four children; they are now with his ex-mother-in-law in Arkansas. His ex-wife has also remarried. These children run in age from fifteen to eleven. The patient said he has seen them only once in the past two years.

In 1958, when the patient was twenty-one, he was living in St. Louis and, because of the need for money and because he was not working, he took part in a burglary, but he was caught. He served thirty-six months in the penitentiary in Jefferson City. While he was there his wife divorced him. At this point the patient pointed out that he has very much trouble remembering these things. He said that it seems like it was only a week ago. He remarried after his release from the penitentiary, but he is unable to remember the date. He has since had five children and he says they range in age from five or six to six months. Patient has had numerous jobs. In the last few months he has been working out of the union hiring hall for truckers. He said that he made a living and that he also did odd jobs to supplement his other pay. He admits that he is greatly in debt and just cannot catch up.

PAST MEDICAL HISTORY: The past medical history reveals the usual childhood diseases, but there have been no operations, although the patient has apparently been injured many times. Once, as a child, he fractured a leg and due to this he was discharged from the service. He said that he enlisted at the age of seventeen, but was discharged only a month later because of that bad leg. Mr. Drope has also one other arrest and that was for car theft. He did not serve any time because he was placed on parole immediately. That was over ten years ago.

Mr. Drope said that he smokes three or four packs of cigarettes a day. He said that he drinks only when he is upset and that he does drink to the point of getting drunk.

In talking further with Mr. Drope, in response to a question about hearing voices, he thinks that he heard voices after his stepfather died and he also described hearing voices only last January and that he saw a vision of his stepfather and grandmother and, apparently, had a conversation with them. The patient admits that he had been drinking at that time also.

Mr. Drope was markedly agitated and upset. He is not a very good historian and he claims much difficulty with memory. He appeared to be cooperative in this examination, but he had difficulty in participating well. As a matter of fact, before he left my office I gave him a sedative to get him calmed down. I also gave him some samples of medication together with a prescription for these medications in the hope that he can get himself relaxed so he can carry on more efficiently. The patient had a difficult time relating. He was markedly circumstantial and irrelevant in his speech. He showed marked anxiety and there was no sign of any depression or apathy at this time. His affect seemed to be harmonious with his thought content. There was no sign as to the presence of any delusions, illusions, hallucinations, obsessions. ideas of reference, compulsions or phobias at this time.

In a simple IQ exam Mr. Drope was able to achieve a score in the low normal range, but on further tests for knowledge of current news events and famous names and places, he did very poorly. Mr. Drope was well oriented in all spheres. With much difficulty he was able to explain a few abstractions. He also showed some difficulty in explaining some differences. He was able, without trouble, to answer questions testing judgement. He had much difficulty even doing the simple counting and calculations problems.

After finishing with Mr. Drope I then talked alone with his wife. She is twenty-four years old and says that she has been married for seven years and has five children. She admits that she has left him several times in the marriage, but came back because of having no money. Often she would leave him because of his sexual perversions. She admits that in the past he has inserted a bottle in her vagina and he has also had rectal intercourse. She said that he had once mentioned that he might do something like bringing up some men to take care of her so that he had actually had it in the back of his mind before. She also said that he is very suspicious and is always accusing her of running around. Appar-

ently, his first wife ran around. Mrs. Drope admits that her husband drinks much, but she doesn't remember him being real drunk more than three times since they were married. She also describes what she feels is strange behavior on his part in order to get sympathy. This would include even falling down flights of stairs to gain sympathy from her. Mr. Drope would stay away two or three days at a time if he got mad at her, otherwise, they got along very well. She thinks that he has been always as nervous as he is now and that he would not hold a job very long because of his nervousness.

IMPRESSION: If it can be said that some people are born with a silver spoon in their mouth then it must be admitted that Mr. Drope was born with a fish hook in his. He has always led a marginal existence. He received practically no education and no training for any worthwhile occupation. Having had several fathers is certainly not condusive to proper father identification. Apparently, abnormal sexual acts are part of Mr. Drope's own culture. He has a history of occasional drinking, although he seems to drink more often than his wife suggests. He also has a history of anti-social conduct. At the present time Mr. Drope is certainly markedly agitated and upset. He finds himself in very much trouble and is confused about the whole thing. I do not find any strong signs of psychosis at this time. This individual certainly needs the aid of a psychiatrist, but I would really not be very optimistic about success about a man like him because I doubt that he would keep up with any kind of psychiatric care, since this requires some modicum of sophistication.

This is a very neurotic individual who is also depressed and perhaps he is depressed for most of the time. Apparently, he certainly has much reason for this. As for the diagnosi I want to offer: (1) Sociopathic personality disorder, sexual perversion. (2) Borderline mental deficiency. (3) Chronic Anxiety reaction with depression.

The prognosis for Mr. Drope must remain guarded. Perhaps his anxiety can be controlled with medication, but one cannot expect much change in his personality defect. Trusting that this is the desired information, I am,

Very truly yours,

/s/ J. S. Shuman, M.D.
JOSEPH S. SHUMAN, M.D.

JSS/meg

IN THE CIRCUIT COURT
CITY OF ST. LOUIS

Cause No. 405-R

May 27, 1969

STATE OF MISSOURI
vs.
JAMES E. DROPE

Charge: Rape

Comes now the State of Missouri and does not oppose the motion for a psychiatric examination of the Defendant James E. Drope in the above entitled cause.

Respectfully submitted,

/s/ John J. Morton
Assistant Circuit Attorney

[Filed May 27, 1969, James H. McAteer, Clerk, Circuit Court for Criminal Causes]

[7] TRANSCRIPT OF TRIAL

Thereupon, on said 23rd day of June, 1969, the trial of the above-entitled cause began in Division No. 19 of said court, before the Honorable David A. McMullan, Judge, presiding in said Division. Mr. Michael Frank, Assistant Circuit Attorney, appeared as attorney for the State of Missouri. The defendant, James Edward Drope, appeared in person in open court. A panel of prospective jurors was then summoned into open court. Thereafter, upon the arrival of Mr. Lester Watson, attorney and counsel for the defendant, in open court, the jury panel was sworn in on voir dire, after which the following proceedings were had in said cause:

MR. WATSON: Your Honor, please, I would like to make a record in this case. Do you want the jury in here while we make it?

THE COURT: You can make your record out of the hearing of the jury.

(The following proceedings were had out of the hearing of the prospective jurors:)

MR. WATSON: Where is the court file? Let the record show that on May 27th, 1969, this case was set for trial, at which time the attorney for the defendant Drope filed a motion for a psychiatric examination, and requesting that the case be continued until the September Term of court. It was determined at that time—the motion filed requested the continuance [8] for the reason that the defendant had been previously examined by a psychiatrist who had recommended further examination, evaluation and psychiatric treatment of the defendant, at which time the Court informed the defendant's attorney that the case would be continued to September, and the defendant—

THE COURT: Well, pardon me. Just a minute. Just a minute, Mr. Watson. This case was assigned here this morning. It was on this morning's docket. You came in, and I have been waiting all day, and it is now four o'clock. And we have been in touch with your office;

we have been in touch with your home and every place else, and then you came in here about twenty minutes ago, a little after 3:30, and you wanted a continuance and the State objected. And I said that continuances were passed upon in Division No. 16, and had already been passed on. I think you were over there to Judge Walsh to make your request and record for continuance. Now you are stating things that Judge Walsh advised you to the contrary. I talked to Judge Walsh over the telephone, and he did not say, and he told me he did not say, that this case would go over to September. And in addition, Judge Walsh told me the motion wasn't in proper form, and he pointed out that it was not in proper form. And I may be mistaken, and I thought that the situation was that you were to file a motion.

MR. WASTON: That is correct.

THE COURT: And you did not do so.

[9] MR. WATSON: As I understood it,—

THE COURT: Pardon me. You in this record started out that a motion was filed.

MR. WATSON: Well, here the file shows a psychiatric—

THE COURT: That is the Clerk's minute. Look at the motion.

MR. WATSON: I am looking at the motion.

THE COURT: Is it in proper form?

MR. WATSON: No, it is not.

THE COURT: Then no motion has been filed.

MR. WATSON: Never overruled or sustained or anything else, but it was filed.

THE COURT: Did you and Judge Walsh agree—

MR. WATSON: I was to file an additional motion?

THE COURT: No, no. Not in proper form?

MR. WATSON: Mr. Morton and I agreed. I don't know that the Judge did. And I was to file an additional form.

THE COURT: Pardon me. I don't mind you making a record but I want the record to be honest.

MR. WATSON: I do too. I don't want it any other way. That is absolutely the way I want it, Judge.

Now, I don't know how far I got before the Court made a statement into the record, but, in any event, counsel for the defendant having filed this motion asking that the case be set in September, and having agreed to file an additional motion [10] that would comply with the statutes, did not prepare this case for trial and did not know it was on the docket until informed by Judge Douglas Jones in Clayton that Judge McMullan has called and asking if I were in his courtroom, and that I was wanted in the Circuit Court in St. Louis.

I have not had the opportunity as yet to file this motion under the statute, asking that the man be sent to Malcolm Bliss Hospital for a further psychiatric—

THE COURT: Just a minute. Pardon me. It appears to me now that your motion is such that a record ought to be made before Judge Walsh.

MR. WATSON: If Your Honor wants us to go over there.

THE COURT: Now, going back and forth over there, I am in this sort of position: Judge Walsh told me that that motion was filed and it was an improper motion, not in proper form, and you suggested, and it was suggested that if you seriously contend that he needed physicatric help, that you would file a proper psychiatric motion. It was not filed. It was docketed. Now, Judge Casey Walsh did not tell me that he sustained the motion that it would be set in September. That is contrary to what Casey Walsh told me. Did Judge Walsh state in September?

MR. WATSON: At the time I and Mr. Morton discussed it.

THE COURT: Not until September?

[11] MR. WATSON: Until September.

THE COURT: And assured you of that?

MR. WATSON: Yes, Judge. May I explain one thing more because he said it took such a long period of time to get a person through Malcolm Bliss, there was a waiting period and it could be done during the summer months and be ready for trial or else the examination would eliminate trial by September.

THE COURT: Did he say he would set it in September?

MR. WATSON: Did he say he would set it in September?

THE COURT: Yes.

MR. WATSON: Judge, I don't know. There was such confusion because the thing was just sort of left off and set later on in the day when I wasn't there, as Mr. Morton said it was set by him and the Clerk of the court when they were resetting all the cases that had gone over from that particular week.

THE COURT: Well, may the record show this: There is nothing in this record,—and the word of Casey Walsh himself, there is nothing in the record to show it was to be set in September, and Judge Walsh did not tell me it was to be set in September and did not assure you it was set in September. The file shows that a minute was entered on May 29th that it was continued to June 23rd. Now, what may have happened is, if you were going to file a motion for a psychiatric examination, it would have the result of it having to go over to September to [12] give time for the examination to be made. Judge Walsh may have said that but there is nothing in the record. And I don't believe that Judge Walsh stated it would be set in September. You just came back from Judge Walsh's division. I am sure if Judge Walsh made that statement to you, he would honor it. And I can only go by the file and Judge Walsh.

And let the record show they went back to Judge Walsh's division, and after being in there fifteen or twenty minutes, Judge Walsh has refused to grant a continuance.

MR. WATSON: That's right. He said the case was assigned over here and the jury waiting all day, and the witnesses were here, and for that reason he didn't feel he wanted to grant a continuance.

THE COURT: It seems strange to me that you would come into the court and before this Judge and start quoting what Judge Walsh said.

MR. WATSON: Because I didn't get an opportunity to question him.

THE COURT: Pardon me. We'll go ahead with the case now. And this jury has been waiting practically all day. We will at least get started. And before the jury is sworn in, I am going to ask Judge Walsh to review this statement. All right.

MR. WATSON: Let me state further into the record, I am objecting to going to trial with this defendant also for the [13] reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial.

THE COURT: All right. The record—

MR. WATSON: Furthermore, for the record, I am going to object at this time for the reason that the State on June 19th, 1969, added five additional witnesses whom we have had no opportunity to examine, and claim surprise for that reason.

Secondly, I am going to object to going to trial at this time for the reason that a memorandum, dated May 27th, 1969, headed "State of Missouri v. James E. Drope. Charge: Rape: Cause No. 405-R. Comes now the State of Missouri and does not oppose the motion for a psychiatric examination of the defendant James E. Drope in the above-entitled cause. Respectfully submitted, John Morton, Assistant Circuit Attorney",—which certainly bears out what I said, that we had agreed to have a psychiatric examination, Your Honor, before he went to trial. That is the second memorandum.

THE COURT: Well, it will be overruled. These matters have already been passed on before Judge Walsh. And let me say with reference to this endorsement of the witnesses, the Court has been assured by the Assistant Circuit Attorney that those were mailed to your office on the morning of June 19th, this memorandum was. And your objection in claiming surprise now should have been another reason urged on Judge Walsh in the [14] Assignment Division. The case has been sent out to trial, and your objection has no merit.

MR. WATSON: Let the record show that I had no opportunity to make such objection before Judge Walsh

as the case was assigned out of the Assignment Division before I ever arrived there. I didn't know it was on the docket.

THE COURT: Well, the dockets are published. And let the record further show—

MR. WATSON: The dockets are published but I had no reason to believe that this case would be on the docket or to look for it specially. My secretary didn't find it. She runs the docket in the cases and tries to be ready for everything.

THE COURT: Your client was interrogated and he stated that you would meet him down here this morning.

MR. WATSON: Judge,—

THE COURT: Let's proceed.

MR. WATSON: —I don't know what he said. Of course, I wasn't here, but I had matters in the Circuit Court in St. Louis County this morning. And that is where I went, and I could not possibly be in the Circuit Court in St. Louis. I was involved in matters in the Circuit Court of St. Louis County this morning, but what my client said I don't know.

THE COURT: I called Judge Douglas Jones.

MR. WATSON: He said you called him; he told me. I was still in his division. I had another matter on at 1:00 [15] o'clock.

THE COURT: Pardon me. Judge Jones stated to me this morning that he just got through calling the docket, that you were not assigned out, that you did not have anything in his court preventing you from coming down.

MR. WATSON: Judge, he didn't know that I did have something on his docket at 1:00 o'clock, and it was 11:30, this was. I didn't leave that room until 11:30,—

THE COURT: This is—

MR. WATSON: —and I went to Judge Bardgett's room on a divorce matter.

THE COURT: Regardless. All right. Let's proceed.

MR. WATSON: May I also put into the record that all this colloquy that we have been going through has

taken place in the presence of the jury. And I feel in looking at it it is going to work to the detriment of the defendant. I don't think it is fair. I have asked—

THE COURT: The trouble, Mr. Watson, with a lot of these things, they are all an afterthought. You said you wanted to make a record. You did not say that you wanted to make it out of the presence of the jury. The record may show the jury is in the courtroom, and this was done at the Bench. And I am sure they haven't heard one word that was said prior.

MR. WATSON: I asked the Court prior to the objection if you wanted to—

* * * *

[23] STATE'S CASE IN CHIEF:

MARIANNE JOYCE DROPE, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Please state your name.
A My name is Marianne Joyce Drope.
Q Marianne, what was your marital status on January 17th, 1969?
A I was living with my husband.
Q What is his name?
A James Edward Drope.
Q Is that the man sitting over there (pointing)?
A Yes, sir.
Q Did you have any children as a result of that marriage?
A Yes, sir; I have five children.
Q What are their names and ages?
A August Lee Drope, James Edward Drope, Anita Marie Drope, Pete Allen Drope, and Patricia Ann Drope.
Q How old is Pete?
A Six.
Q The oldest is six. And the youngest?
A She is nine months.
Q When were you married to James Drope.
A I have been married to him seven years. It was December the 24th,—
Q When was that, the 24th?
A The 24th.
Q You were—How old are you now?
A Twenty-four.
Q You were seventeen at that time?
A Yes.
Q Had you graduated from high school at that time?
[24] A No, sir, just grade school.
Q Did you finish the 10th grade?
A No, sir.

Q After leaving school, how old were you at that time?

A Sixteen, I believe, or a little over.

Q At that time when you left school, what did you do, mam?

A I worked for my mother and my parents.

Q How long after leaving school did you marry Jim?

A Almost a year.

Q Again, you were seventeen. Turning to January 17th, 1969, which was a Friday, did your husband James Drope have a job?

A Sir?

Q Did your husband have a job on January 17th?

A No, sir, he was unemployed.

Q What did he do when he was employed?

A He worked for the—as a union truck driver.

Q Do you remember how much he had worked that January?

A No. I would say not more than a week within that month.

MR. WATSON: If your Honor please, I want to make an objection to any further testimony on behalf of this witness for the reason she and the defendant are husband and wife.

THE COURT: Be overruled.

Q (Mr. Frank) When was the last time before January 17th he worked consistently?

A Before then? It had been over two months. I couldn't say.

[25] Q Will you tell us where you were living on January 16th or 17th?

A 3438 St. Vincent.

Q Is that in the City of St. Louis?

A Yes, sir.

Q Marianne, will you describe for us first the type of building you were living in?

A It was a 2-family, brick flat, and I lived on the 2nd floor.

Q And, Marianne, will you tell us about this apartment on the 2nd floor we are interested in?

A Two bedrooms, living room and kitchen.

MR. FRANK: Does the Court wish to see the pictures?

THE COURT: Well, when you have them marked.

(Thereupon, the reporter marked two photographs depicting living quarters, for identification as State's Exhibits 1 and 2, respectively.)

Q (Mr. Frank) Marianne, I show you that which has been marked State's Exhibit No. 1. Will you look at that, please? Can you identify that picture?

A Yes, sir.

Q What is that a picture of, Marianne?

A The front entrance of the house where I lived at 3438 St. Vincent.

Q Marianne, does that picture fairly and accurately depict the front of your house as it was on the 16th and 17th?

A Yes, sir.

Q Marianne, I will show you State's Exhibit 2. Can you identify that picture?

A Yes, sir.

Q What is that a picture of, Marianne?

A It is the stairway to the front door going upstairs where I did live.

[26] Q Does that picture fairly and accurately depict the steps going up to your apartment as it existed on the 16th and 17th of January of this year?

A Yes, sir.

MR. FRANK: Your Honor, at this time I would like to offer into evidence—

MR. WATSON: We have no objection.

MR. FRANK: —State's Exhibits 1 and 2, and ask permission to pass these to the jury.

THE COURT: Very well.

(Thereupon, said exhibits were handed to the jury.)

Q (Mr. Frank) Marianne, on January 16th, which was a Thursday, on that night did your husband leave home at any time?

A Yes, sir, he left at 8:30 that evening.

Q And where was he going when he left home at 8:30 that evening?

A He said he was going to the store for groceries and for milk for my baby.

Q And what did you do, mam, when he left?

A I watched television until about 11:00 and I fell asleep.

Q When you fell asleep, was he home then?

A No, sir.

Q What was the next time you woke up, Marianne?

A At 1:00 o'clock to feed my baby.

Q That would be 1:00 A.M. on the 17th?

A Yes, sir.

Q And did you feed your baby?

A Yes, sir.

[27] Q And what happened then?

A Well, I just laid down and hadn't quite fell asleep, and I looked at the clock, and it was about 1:30. And I heard somebody at the door, and the key was turning.

Q What did you say?

A I said the key was turning in the door, and I heard somebody open the door to come in.

Q After you heard the key turn in the door, did the door open?

A Yes, sir.

Q And then did you hear anything?

A I heard my husband come in the steps because he said, "Don't be afraid, it is just me coming in."

Q It was his voice?

A Yes, sir.

Q Marianne, when you heard that key in the door and heard him say, "It's is me", were any lights on in your apartment at that time?

A When he came up the steps, the landing, the bathroom is off to the left, and he went in the bathroom and turned the light on and went through the hallway from there to the kitchen. And he went to the bathroom. So when he turned the bathroom light on, the bathroom light was on then. It wasn't on before.

Q Marianne, what did he do in the kitchen, did you see or hear?

A He opened the back door. I heard him open the back door.

Q What happened at that time?

A There was quite a bit of noise at once, and a bunch of guys coming running in [28] all at once with my husband.

Q Marianne, I want to stop you. You said a bunch came running in. Will you tell us, did any men come from the front door?

A Two from the front, two from the back.

Q The kitchen door you are talking about?

A Yes, sir.

Q Is that five, counting your husband?

A Yes, sir.

Q What happened when they came running in?

A They were there before I had enough time even to get up out of bed.

Q What happened then when they came running in?

A They forced me down on the bed and my husband said, "Done move, don't scream or I'll blow your brains out."

Q When you say they forced you down on the bed, what do you mean, one or two or—?

A They all did.

Q Did each of the men grab an arm or a leg?

A Yes. And they proceeded to tie me up.

Q Marianne, you just said your hsuband said what to you?

A He said to me not to scream or make any noise or he would blow my brains out.

Q What was he going to blow your brains out with?

A He had his gun with him.

Q Did you see this gun?

A Yes.

Q Marianne, could you see these men?

A Yes, sir.

Q I asked you a few minutes ago, Marianne, if there were [29] any lights on in your apartment before your

husband came in, and your answer was "No". How can you tell the Court and jury that you could see these men, you could see the gun?

A The bathroom light was on. And where my bed is there is a window light there, and my baby had torn the shade enough, we could see the light from the outside on the bed. With the bathroom and that light shining in the same direction, I could not miss seeing them.

Q Marianne, your husband had the gun. What happened then?

A Well, they tied me up first to the bed.

Q Who tied you up?

A Mike Barylski, and the others were holding me down.

Q Did your husband help?

A My husband helped, yes, sir.

Q He tied your hands or legs, or what part of your body did he tie?

MR. WATSON: Your Honor, I will object to that as being leading and suggestive.

THE COURT: It will be sustained.

Q (Mr. Frank) Marianne, what part of your body did your husband tie?

A My hands and my legs to the bed posts.

Q While he was doing that, Marianne, who had the gun?

A My husband, which he gave the gun to Raymond Tuttle at that time.

Q After tying you to the bed, what happened, Marianne? [30] Did your husband stay in the room?

A Yes, sir.

Q Was there any other weapon other than the gun, Marianne, that Tuttle now was holding?

A My husband then went into the kitchen and got a butcher knife.

Q In your kitchen?

A Yes, sir.

Q What did he do with the butcher knife?

A He held it to my throat.

(At this point the reporter marked a nightgown for identification as State's Exhibit 3.)

Q Marianne, I will show you what has been marked as State's Exhibit 3. Can you identify that?

A Yes, sir. That is my nightgown.

Q That is the nightgown you had on that night?

A Yes, sir.

(At this point the reporter marked a third photograph for identification as State's Exhibit 4.)

MR. WATSON: I am going to object to that exhibit for the reason that that picture is apparently—the date on the back of it shows it was not taken until June of 1969.

(The following proceedings were had out of the hearing of the jury:)

MR. WATSON: And it is quite evident that the picture shows that, that this whole matter was set up by someone else and was not the original condition of the room on the 17th day of January, 1969.

[31] MR. FRANK: Now, Your Honor, we will have witnesses to testify as to when that picture was taken. That picture was printed on the date on the back.

THE COURT: Overruled at this time, the Court reserving any further objections along that line, but it may be identified.

(The following proceedings were had within the hearing of the jury:)

Q (Mr. Frank) Now, Marianne, I show you State's exhibit No. 4. Will you tell the Court and jury what that is a picture of?

A It is a picture of the bed where I was tied up, and the rope, and shows exactly where it was and where my son helped me get loose from it.

Q Marianne, looking at that picture, does that picture show the window you were talking about a moment ago?

A Yes, sir.

Q Does it show the tear in the shade that you were talking about a moment ago?

A Yes, sir.

Q Where is that tear?

A It is right alongside of the bed (pointing on exhibit) where the window is.

Q Level with the head on the bed?

A Yes, sir.

MR. FRANK: Your Honor, at this time I would like to enter into evidence State's Exhibit No. 4.

MR. WATSON: Objection, Your Honor, we have made in [32] the record before, until such time as the proper foundation is laid. And also no date has been set as to the time the picture was taken if what Counsel say is right.

MR. FRANK: Your Honor, I might be able to assist Counsel.

Q Marianne, were you present when the photographer was taking pictures around your place with the officers?

A No.

Q You weren't there at that time.

MR. FRANK: Your Honor,—

THE COURT: Well, if you state in the record you will prove it.

MR. FRANK: Your Honor, the State will put on a police officer who will testify that he was present when this picture was taken.

THE COURT: When?

MR. FRANK: That will be the next witness, unless you want me to put him on right now.

THE COURT: When was that picture taken?

MR. FRANK: That morning, January 17th, the day it happened.

THE COURT: All right. It will be overruled.

MR. FRANK: All right. At this time may it be accepted into evidence?

THE COURT: It will be admitted into evidence.

[33] MR. FRANK: At this time I will pass it to the jury, Your Honor.

Q Marianne, did you see the other men that were in the room with your husband?

A Yes, sir.

Q Who were they?

A Roger Butler, Rayborn Tuttle, Mike Barylski and another kid I don't know.

Q You say "kid". Are you talking—how old a person?

A Sixteen.

Q Do you know this Butler, Tuttle and Barylski?

A They used to work on cars with my husband and see him with them.

Q Marianne, how were your hands tied to this bed?

A Well, tied to the bed posts (indicating).

Q You mean straight back, Marianne?

A Yes.

Q They weren't tied together?

A No, back (indicating).

Q Marianne, how about your legs, how were they tied to the bed post?

A Spread.

Q Were they tied the same way, spread out?

A Spread out.

Q All right. Marianne, after you were tied to bed in this manner, will you tell us what happened at that time?

A They took turns raping me, first Roger Butler.

Q Marianne, while Roger Butler was having intercourse with you, was anybody else on you at the same time?

[34] A No, but there was somebody over me.

Q Somebody over you. Over your head?

A Yes, sir.

Q Who was over your head?

(At this point the witness placed her hand on her face and began crying.)

MR. FRANK: May we have a moment, Your Honor?

THE COURT: All right. Counsel, you may. Pardon me, it would be better, I think.

MR. FRANK: All right.

Q Marianne,—

A Mike Barylski was over me.

Q Mike Barylski. What was Mike doing over you?

(At this point the witness shook her head and sobbed and wiped her nose.)

THE COURT: Madam, pardon me, you are going to have to do the best you can. If you need a recess, if you have to have a recess,—

THE WITNESS: No, I will—

THE COURT: —tell the Court. All right.

Q (Mr. Frank) Marianne, what was Mike Barylski doing?

A He put his privates in my mouth.

Q Put his male organ in your mouth, Marianne?

A Yes, sir.

MR. WATSON: Just a minute. I am going to object to Counsel commenting and leading the witness. I think the witness—

[35] THE WITNESS: (Intervening) He put his privates in my mouth.

Q (Mr. Frank) Marianne, do you know about how long Mike was on top of you?

A No, sir. They took turns. I couldn't see the clock and see the time exactly, no.

Q Did Mike have a discharge while he was on top of you?

MR. WATSON: I believe—I am going to object to that for the reason we are not responsible for that. The defendant is only charged with rape.

THE WITNESS: (Interjecting) And sodomy.

MR. WATSON: He is merely charged with rape.

THE COURT: Well, the objection will be sustained as to that particular thing.

Q (Mr. Frank) You say Roger was having intercourse with you at that time?

A Yes, sir.

Q Did Roger have a discharge at the time he was on you?

MR. WATSON: Your Honor, I make the same objection. This defendant here stands charged with rape, not what Roger Butler did.

THE COURT: Overruled.

Q (Mr. Frank) Marianne, I will ask you again. Do you know if Roger Butler had a discharge while he was on top of you?

MR. WATSON: Just a minute. Your Honor, I am going to object to that as leading and suggestive.

THE COURT: Well, she can tell what happened. The [36] objection will be sustained as to it being leading.

Q (Mr. Frank) Marianne, will you tell us what happened while Roger Butler was on top of you?

A He had intercourse with me. Whether he had a discharge, I could not tell you, I could not swear to that.

Q Marianne, when Roger got off, what happened then?

A Mike Barylski, and Roger Butler at the top.

Q Which position?

A Ah, switched position.

Q Did Mike then have intercourse with you?

MR. WATSON: I object to that, Your Honor. It would be leading and suggestive.

THE COURT: Counsel, the objection is sustained.

Q (Mr. Frank) What happened when Mike got on top of you?

A Mike Barylski had intercourse with me while Butler was on top.

Q Will you tell what happened while Mike was on you?

A All the time this was happening, Raborn Tuttle had his gun at my head, at the same time my husband had the knife at my throat. And they told me if I said anything or screamed, he would blow my brains out, or kill my kids.

Q Who told you that?

A Raborn Tuttle.

Q When Mike got off you, what happened then?

A Then there was this kid next. And then my husband was at the top. They switched places.

Q Did you know this kid?
A I know him from seeing [37] him, yes.
Q Do you know his name?
A I can't tell you his name, no.
Q All right. After this teen-ager and your husband were on you, what happened then?
A Then my husband had relations with me in the rectum.

MR. WATSON: Your Honor, I am going to object to that; husband wife, Your Honor.

THE COURT: Well, I think in this particular case, the objection is overruled, although we can take care of that on argument. All right.

Q (Mr. Frank) What happened then after your husband?

A Then there was Tuttle—Raborn Tuttle just alone. He had intercourse with me.

Q Who held the gun at the time?

MR. WATSON: Your Honor, please, I am going to object.

THE COURT: Pardon me. It will be sustained.

Q (Mr. Frank) Tell us what happened when Tuttle was on you?

A Roger Butler held the gun.

Q Marianne, could you tell us whether or not you could tell if any of these men were drinking?

A They smelt of it. I couldn't say they were.

Q Marianne, what were you thinking, what was your state of mind when these acts were committed upon you?

MR. WATSON: Your Honor, I object to that for the [38] reason that it invades the province of the court and jury and it calls for speculation and conjecture.

THE COURT: Overruled.

MR. FRANK: Your Honor,—

THE COURT: It is overruled. You may proceed.

Q (Mr. Frank) Marianne, what was your state of mind? What were you thinking when these acts were being committed upon your person?

MR. WATSON: I object further, Your Honor, for the reason the question is too general, not specific as to time and act.

THE COURT: You better come up here just a minute.

(The following proceedings were had out of the hearing of the jury:)

THE COURT: What else do you have from the State?

MR. FRANK: I have a case citation it is proper on a rape case; I have the citation, Supreme Court, 1964, case.

THE COURT: What do you expect the answer to be?

MR. FRANK: The answer that would be elicited, that she kept her eyes open at all times so that she would not forget anything that happened.

MR. WATSON: That wasn't the question. "What were you thinking?" Whether her eyes were open—

THE COURT: Just a minute. You need not argue it any further. I want to know what your answer is? What is your [39] citation?

MR. FRANK: 380 S.W. 362.

THE COURT: All right. The objection is overruled.

(The following proceedings were had within the hearing of the jury:)

THE COURT: You may answer the question. Do you remember the question?

A Yes, sir. He asked what I was thinking about at the time. Well, the only thing I could do was keep my eyes open and keep track of everything that was going on, which I could see everything that was going on at the time because I had been through this with my husband before, and I know how he acts, similar.

(At this point the reporter marked strands of a clothes line for identification as State's Exhibit 5.)

Q (Mr. Frank) Marianne, I show you that which has been marked State's Exhibit No. 5. Will you look at that, Marianne. Can you identify that, Marianne, for the Court and jury?

A This is the clothesline they tied me up with.
Q Did you have that type of line in your house at the time, Marianne?
A No, sir.
Q This was not in your house at the time?
A No, sir.
MR. FRANK: At this time, Your Honor, I ask that State's Exhibit 5 be entered into evidence.
[40] THE COURT: Well,—
MR. WATSON: Before it is entered, may I ask a few questions on voir dire?
THE COURT: Very well.

VOIR DIRE EXAMINATION

BY MR. WATSON:

Q May I have that. Mrs. Drope, you identify this as being a clothesline or something that you were supposed to have been tied up with. Do you have any marking on there by which you can identify it?
A Do I have any marking?
Q That's right.
A No, sir.
Q In other words, you are not sure whether this is the same clothesline, as we will call it, as was used or not, are you?
A I think so.
MR. FRANK: May the record show that the next police officer will testify—
THE COURT: Pardon me. The exhibit will be kept out until the next police officer testifies.
MR. FRANK: All right.

(At this point the reporter marked a revolver for identification as State's Exhibit 6.)

DIRECT EXAMINATION (Cont'd)

BY MR. FRANK:

Q Marianne, I show you State's Exhibit 6. Will you look at that and will you tell the jury what that is?

A This is the gun that was used on me at the time I was raped.

[41] Q Do you know whose gun that is?

A Yes, sir. My husband's—James Drope.

Q Have you seen that gun before that particular night?

A Yes, sir; many times.

Q Marianne, can you tell the Court and jury how long these acts took place upon your person?

A It was about 1:30 because I just looked at the clock when he, my husband, opened the door, and I believe it was about 3:30, maybe quarter to four when the police got there. And they had just got there within thirty minutes—I wouldn't say; ten minutes at the very most.

Q The police got there within ten minutes?

A Yes, sir.

Q And the police got there about 3:45 or the latest was about 3:55?

A Yes, sir.

Q Marianne, when they left, did your husband leave with them?

A Yes, sir.

Q When they left, what position were you left in?

A I was tied to the bed posts, and, as I said before, with my arms and legs stretched. They had put a towel and a scarf around my mouth to gag me, with the cotton in my mouth first. They left me tied, and they covered me up with a sheet.

MR. FRANK: I'll get my evidence in.

(The reporter then marked an envelope allegedly containing cotton, for identification as State's Exhibit 7.)

[42] (The reporter then marked a towel, for identification as State's Exhibit 8.)

(The reporter then marked a scarf, for identification as State's Exhibit 9.)

Q Marianne, I show you that which is marked State's Exhibit 7. Will you tell the Court and jury what that is?

A What it is? It is tissue paper.

THE COURT: What was the answer?

A It was tissue paper they had stuck in my mouth before the rape.

Q (Mr. Frank) I will show you now that which has been marked State's Exhibit No. 8. Can you tell us what that is, please?

A A towel.

Q What was the towel—how did they use it?

A They put the scarf around the neck and tied the towel around the mouth after they put tissue paper in my mouth.

Q What went over your mouth directly, the towel or the scarf?

A The towel and then the scarf.

Q I will show you that which has been marked as State's Exhibit 9. Can you identify that?

A Yes.

Q What is that, Marianne?

A It is the scarf that was over my mouth, and the towel.

Q All right. Did they just lay it over your mouth?

A No, it was tied in the back with a knot.

Q The towel and then the scarf? The scarf went on top [43] of the towel over your mouth?

A I am trying—just a minute.

MR. WATSON: Well, Your Honor, I object. That is repetition. Counsel went over that before. The witness has already answered.

THE COURT: Overruled.

Q (Mr. Frank) Will you answer directly which went on top, which was tied?

A The scarf, and then the towel.

Q Did your husband or any of the other men say anything to you, Marianne, when they left?

A Yes, sir. They say if I ever said anything about this what had happened, they would be back and kill my kids.

MR. WATSON: Your Honor please, I am going to move that this be stricken. It doesn't differentiate between certain people that were supposed to have been there. Counsel had two questions in one.

THE COURT: Well, pardon me. He can separate them.

Q (Mr. Frank) Marianne, did your husband personally say anything?

MR. WATSON: I object to that as leading and suggestive, Your Honor. Counsel can certainly ask who it was.

THE COURT: Who said anything, and what.

Q (Mr. Frank) Who said anything, and what?

A I believe Bob Butler and Raborn Tuttle, both. And with this my husband said, "This isn't the first time this is going to hap- [44] pen", right after.

MR. WATSON: They said, "This is the first time?"

A They said they would be back; this wasn't the first time it was going to happen.

MR. WATSON: Who said that? Tuttle?

A My husband.

MR. WATSON: He said it?

A Yes, sir.

MR. WATSON: All right.

Q (Mr. Frank) Marianne, how did you get free from the bed?

A My little girl, 3, and my boy, 6, apparently couldn't sleep, awake, but as soon as they left, they got up and came to the room where I was. And my little girl was scared. So she went back and told my oldest boy named August to come in there. I heard her. They came in there and seen me and went right to the kitchen and got a knife and untied me, cut the rope.

Q What did you do then?

A I proceeded to go downstairs as soon as I could make it down the steps and asked the lady downstairs to call the police for me please, and she did.

Q How soon after the phone call did the police arrive?

A I'll say not more than ten minutes at the very most. I couldn't say exactly but within minutes though.

Q Did your husband return that morning?

A He was just coming in as they came. As soon as they got there he started in the door, came back.

[45] Q What happened at that time, Marianne?

A One was at the bottom of the steps and the other one was at the top, talking. And when he started to talk, I said, "Please not let him in. He had a gun and he just threatened me a while ago, and not let him in."

Q Was your husband present during the time all these acts were committed upon you?

A Yes, he was standing right over me. He was telling them what to do.

MR. WATSON: I move that be stricken as not responsive. A voluntary statement on the part of the witness.

THE COURT: The statement, "He stood right over me", may stand. The balance—

MR. WATSON: The jury instructed to disregard it.

THE COURT: —the jury is instructed to disregard. Members of the jury, during the trial, when the Court sustains an objection, the jury automatically disregards that.

MR. FRANK: Your Honor, at this time the State introduces Exhibits 7, 8, and 9 into evidence.

THE COURT: Very well.

MR. WATSON: May I see the cotton? This is the envelope. Is this cotton that was taken?

MR. FRANK: Do you have any objection?

MR. WATSON: No, we have no objection.

MR. FRANK: May it be entered?

THE COURT: Very well.

[46] Q (Mr. Frank) Marianne, after your husband was arrested, what happened then?

A They took me to the—the police officers took me to City Hospital for an examination.

Q Marianne, did you have any physical injuries to your person?

A I had a very bad infection.

Q Did you have any marks on your body?

A I had marks, yes, on my face and my neck.

Q What hospital? City Hospital "1"?

A Yes, sir, "1".

Q After the hospital, what happened, Marianne?

A I went to the police station and gave a report on what had happened. I went to the Warrant Office from there.

Q The Warrant Office in the Circuit Attorney's Office?

A Yes.

Q Marianne, on the day of the 17th, some time in the afternoon, were you present when your husband was questioned by the police?

A Yes, sir.

Q Were you present when he was advised of his constitutional rights by the police?

A Yes, sir.

Q Did he make any statement to the police in your presence?

A Yes, sir.

Q Marianne, what did he tell the police in your presence?

A Just what he said?

Q That's right.

A Just what he said or what the whole—?

[47] Whatever he said, that is the question.

A He said—he admitted that he did it, and he said did it as a joke. He said it was all just a joke.

Q Did he go into detail and tell the police what had happened?

A He said he was with Raborn Tuttle, Roger Butler and Mike Barylske, and came up to my house with the intention to rape me.

Q Marianne, since this incident have you and your husband lived together as man and wife?

A We have a very short time, yes, sir.

Q How long after this incident did you live together as man and wife?

A Three to four months.

Q Where were you living at that time?

A Well, we lived downstairs from my mother's house, 7918 South Broadway.

Q Will you tell us why you went back to live with him?

A Because—

MR. WATSON: If your Honor please,—I'll withdraw the objection.

THE COURT: All right.

A Because he was trying to make me—make out he wasn't well. The boy was telling that he was going to a psychiatrist, it was best to go with him, and went with him with my other friend to see if there was any hope left because of my children. And when he went to the psychiatrist and I talked to him, he says it would be best if we would try to get along together, [48] that he thought he would be all right. But he said he would go on and go to work, try to take care of the children. That is what I wanted,—my children taken care of.

Q (Mr. Frank) Marianne, do you have your children now at this time?

A No, sir.

Q Where are they?

A I don't know.

Q When was the last time you saw your children?

A Tuesday morning.

Q Do you know who has your children?

A No, sir.

Q Does your husband or anyone on his side of the family have them?

MR. WATSON: Your Honor, I object to that as being leading and suggestive.

THE COURT: Well, she said she didn't know. Be sustained.

Q (Mr. Frank) What have you done, Marianne, trying to find your children?

A I went to the police. They suggested that I talk to the Circuit—

MR. WATSON: I can't hear you.

A I went to the police station to search, and they suggested that I speak to the Circuit Attorney to see what they thought I could do about it. And I went to the relief lady again.

Q (Mr. Frank) Marianne, on Tuesday when you last saw your children, where were they?

A 7918 South Broadway, [49] at my house.

Q Were they with anyone at that time?
A They were with my stepfather.
MR. FRANK: I have no further questions at this time, Your Honor.
THE COURT: All right. I think now would be a good time to take a short recess. And, members of the jury, keep in mind the admonition the Court has given you. The court will be in recess.

(Court in temporary recess)

CROSS-EXAMINATION

BY MR. WATSON:

Q Mrs. Drope, when were you and your husband married?
A We were married in December.
Q The year, please? What year?
A Wait just a minute.
Q Beg pardon?
A Just one minute.
Q I am sorry. I thought you said in '33?
A No. December 25th, 1960, I believe,—'61.
Q You were married on Christmas day, on Christmas Day in '60 or '61?
A The 16th. I am sorry.
Q I am sorry. I understood you to say the 25th. Now, Mrs. Drope, in 19—how long—You and your husband went to live together after you were married in '60 or '61? Was it '60 or '61?
A '61, I believe.
Q '61. Now, tell me, after you were married. were you and your husband divorced?
A After we were married, no, [50] sir.
Q Have you ever been divorced from James Drope?
A No, sir.
Q You never have. And then you continued, I assume, to live with him as his wife from '61 until 1968; is that right, or '69?
A Off and on.
Q Off and on. You had separations during that period of time?

A Yes, I did.

Q And then you would go back together again, is that correct?

A Yes, sir.

Q Now, when you had these separations, what was the cause of the separation?

A He would not work part of the time and take off, not work, would not support the children. I had no other choice.

Q But to leave him, is that right?

A I had to have somebody to help me, yes.

Q And where did you go?

A He left.

Q Pardon me, when you left, where did you live then?

A Where did I live then?

Q Yes.

A Well, I stayed at my Mother's part of the time. I did the best I could.

Q Now, I understood you then during this period of time off and on was the period he would not work; is that correct?

A Yes, sir.

Q And, Mrs. Drope, you did live, with the exception of [51] these separations, for these nine years together as husband and wife?

A As husband and wife, yes.

Q That is correct? Is that right?

A Yes.

Q And he did work quite a bit of the time, did he not?

A To nail it down right now, I couldn't say; maybe half and half, maybe a little more.

Q Now, Mrs. Drope, didn't he lose jobs because of his nervous condition, do you know?

A Not to my knowledge.

Q Not to your knowledge?

A No, sir.

Q But when he worked, he always contributed to the support of you and the children, is that right?

A No, sir.

Q Pardon?

A No, sir.

Q He did not?
A No, sir.
Q What would he do with his money, if you know?
A I don't know.
Q Mrs. Drope, since this thing happened you have lived together I think you said for three months, approximately,—
A Approximately.
Q —as husband and wife?
A Yes, sir.
Q And during that period of time he has contributed to the support of you and the children, has he not?
A Part of the time.
Q Part of the time?
A Yes, sir.
[52] Q Which part now? I mean by that, is that the time when you were separated that he didn't support you?
A Never when we were separated.
Q What?
A Never when we were separated.
Q Never when you were separated. Mrs. Drope, you talked with the Circuit Attorney about this case, have you not?
A Talked to him about it?
Q Yes, sir.
A I read the statement.
Q You read the statement?
A Yes.
Q Whose statement?
A My husband's statement, the boys'.
Q You read all those statements?
A Yes, sir.
Q Where did you read those?
A At his office.
Q In the Circuit Attorney's Office?
A Yes.
Q And when did that happen?
A Hmm, that was, I believe, about a month ago or somewhere.
Q About a month ago?

A I think so.

Q All right. Now, then, did you talk to anybody from the Circuit Attorney's Office since that time?

A None other than coming here.

Q Beg pardon?

A None other than the other day when I was here.

Q That was Monday?

A Yes, sir.

Q Pardon?

A Yes, sir.

Q And how did you get here that day?

A I came in a [53] car.

Q You came in a car?

A Yes, sir.

Q Your car?

A No, sir.

Q Whose car was it?

A A man that I know, her husband.

Q Some people brought you here?

A Yes, sir.

Q Now, Mrs. Drope, right after this happened, back on the 12th day of February, 1969, you came to my office, did you not, with your husband?

A Yes, sir.

Q And we discussed this matter?

A Yes, sir.

Q And at that time didn't you tell me that you felt your husband was sick and needed psychiatric care?

A Yes, sir.

Q And, Mrs. Drope, after this discussion you did not want to prosecute your husband, did you?

A No, sir, I did not, and after talking to you I said I would not.

Q And you signed, Mrs. Drope,—I'll hand you here—

MR. WATSON: Will you mark this please as the defendant's exhibit.

(The reporter then marked a statement for identification as Defendant's Exhibit "A".)

MR. FRANK: May I see that, please?

MR. WATSON: Sure (handing exhibit to Mr. Frank).

THE WITNESS: You want me to answer that question completely?

THE COURT: There is no question pending now, madam.

[54] Q (Mr. Watson) Mrs. Drope, I am going to hand you the Defendant's Exhibit "A", and ask you if that is your signature?

A Yes, it is.

Q And you signed that, did you not?

A I certainly did.

Q On the 12th day of February, 1969?

A Yes, sir.

Q And at that time, Mrs. Drope, you didn't want to prosecute your husband, did you? You felt he was a mental case, is that right?

A You told me you would make an appointment for him to see a psychiatrist, you thought it would be best for me to go with him, and this is what I done.

Q Yes.

A At that time I agreed with you, yes.

Q That's right. And you and your husband went to see Doctor Shuman, a psychiatrist; isn't that correct?

A Yes, sir.

Q And he examined your husband, and he also spoke to you quite a bit, did he not?

A Yes, sir.

Q And you felt, did you not, Mrs. Drope, after that that your husband was a mental case?

A He told me that he had some problems, the doctor did.

Q The doctor told you that?

A That he needed to see somebody to talk to. Insofar as what was wrong with him he could not tell me, that he thought it would be better if I were with him.

Q If you were with him?

A Right.

[55] Q That is, live with him; is that what he meant?

A What he meant I don't know exactly. He said I would be better with him, what he told me.

Q Mrs. Drope, when you talked to the doctor, did you tell him that the cause of the separations that you had were caused because you would often leave him because of his sexual perversion?

A Did I tell the doctor that?

Q Yes.

A I cannot say for sure. I probably did because he asked me about it, and I told him exactly. He asked me and I told him.

Q And you also described to him, Mrs. Drope, some very unusual acts, sexual acts on behalf of your husband, is that right?

A That's right.

Q All right. That is the situation. And, Mrs. Drope, do you recall that at one time while you and your husband were together that he blacked out and rolled down a pair of stairs—stairway, rather; do you recall telling the doctor about that?

A I never told anybody he blacked out. I seen him roll down steps, yes.

Q Beg pardon?

A Yes, sir, I seen him roll down steps, yes, sir.

Q Do you know what was the cause of that, why he rolled down the steps?

A The only thing I can tell you is what they told him many times at City Hospital, that is something he does upon hisself.

[56] Q Something he does upon himself?

A Yes, sir.

Q Let me ask you—Did I interrupt you?

A Go ahead.

Q May I ask a question?

A Yes.

Q All right. When these scenes occurred, the usual thing you described to Doctor Shuman, would that be the result of some dispute or argument between you and your husband or would he just go into one of these things and fall down the steps?

A Usually when he doesn't get his way or is worried about something. He doesn't say anything about it. I

can't say exactly. It is more what he would say. I don't know the reason.

Q Well, Mrs. Drope, during the period of your married life and up till now your husband has always been very nervous, has he not?

A At times.

Q You mean varying at different times?

A Not as nervous since he has been, since this incident, no.

Q Tell me, when did you go back to live with him, Mrs. Drope, after the 17th day of January of this year?

A I believe it was the last part of April, somewheres around in that, I don't know exactly.

Q When you came to my office with him, you were not living together as husband and wife at that time?

A No, sir.

Q You were separated?

A Yes, sir.

[57] Q But then you went back and lived together about three months, sometime in April? And then you wouldn't be up until now. April and May. Would it be before May, would it, excluding March?

A Be around the 1st of April, I couldn't say. It is so mixed up.

Q All right. Well, Mrs. Drope, if I recall your testimony, you said the doctor said that Mr. Drope needed treatment, is that right?

A He said he had some troubles, but he should go up there and talk to them at Malcolm Bliss, but Jim would not go.

Q Do you know whether or not he has visited Malcolm Bliss, of your own knowledge?

A Of my own knowledge?

Q Yes, mam.

A Ah, he told me he had been.

Q He told you he had been. He had been going to Malcolm Bliss?

A I think he went there once. I don't know about any other time.

Q At least one time you know of it?

A Yes, he told me.

Q Yes. Now, Mrs. Drope, I don't like to go into these things. Some things are necessary. This exhibit, State's Exhibit 4, the picture of the bedroom with the bed and the rope lying around on the floor, would you look that that, please?

A Yes, sir.

Q Now, was the bed in that position the night that this was supposed to have happened—

A Yes.

[58] Q —or did happen, supposedly? It was sitting right in the room in that manner; it wasn't over in the corner anymore?

A No, sir.

Q It was just like that, is that right?

A Right.

Q And now I believe you named—May I have it (referring to the exhibit). You named four men. Was your head at the top of the bed?

A Yes, sir.

Q And the back of the top of the bed was against the wall and right near that shade with the hole in it; is that right?

A Yes, sir.

Q Now, you have described here to the jury on direct examination that one man was having sexual intercourse with you, and one man was, I think you said, over your head. Now, if he was over your head, I presume his feet would have to be up against the top of that bed, is that right?

A (Witness shaking head).

Q That is not right?

A No.

Q Well, in what position?

A Standing.

Q Oh, he was standing?

A Yes, leaning over.

Q Over the side of the bed?

A Uh-huh.

Q Oh, I see. And the other man was supposed to be having intercourse with you at the same time?

A Yes.

Q Did you, Mrs. Drope, scream or holler or try to seek help?

A Would you scream and holler with a gun at [59] your head and a knife at your throat?

Q Probably I wouldn't but I am asking you if you did?

A No, sir.

Q You didn't make any outcry?

A No, sir.

Q Didn't attempt to rouse your children?

A My children were plenty aroused.

Q But they didn't come to your help?

A I guess not.

(Witness starts to cry again)

Q Still after all this happened, Mrs. Drope, on the 12th of February you didn't want to prosecute your husband, and you thought he was a mentally sick man and thought he needed help, is that right?

A I thought if there was a last possibility. I had five children which I loved very much. If he was sick, I would try everything I could, yes.

Q Weren't you convinced that he was sick after talking to Doctor Shuman?

A No, sir.

Q You were not convinced. What is more convincing—

MR. FRANK: Your Honor, I am going to object to this line of questioning.

A He did not tell him—

MR. FRANK: Just a minute. Will you approach the Bench, please.

(The following proceedings were had out of the hearing of the jury:)

MR. FRANK: Judge, he has not raised any defense of [60] insanity under the mental health statute. We

talked about this. He is going into it directly from the back door. He is trying to get in from the back door what he can't get in from the front door.

MR. WATSON: That may be a good way of describing it, but I think this witness, and his wife, living with him for nine years, certainly can express her opinion, being the prosecuting witness, as to his condition.

THE COURT: As to his health, but regardless of that now, the record may show this has been brought, and Mr. Watson has stated that he hasn't pled insanity.

MR. WATSON: That is right.

THE COURT: But he is setting it up—wait a minute. He is setting it up as a condition as a whole. He also brought in falling down these steps.

MR. WATSON: That is right.

THE COURT: That he would be incapable of doing these things; if he was doing it physically, it would be an unusual situation, due to his physical, general nervous condition and not insanity in the sense.

MR. WATSON: Not as set forth in the statute.

THE COURT: Well, now, that is the very thing that you would eliminate.

MR. WATSON: I say not as set forth in the statute.

THE COURT: Well, I'll let him go into it. The door [61] has been opened. All right.

(The following proceedings were had within the hearing of the jury:)

Q (Mr. Watson) Mrs. Drope, I believe you told Counsel for the State that you don't know where your children are?

A No, sir.

Q Mrs. Drope, didn't you leave your children with your stepfather?

A They were with my stepfather, yes.

Q And you left them there with him, did you not?

A Yes, sir.

Q And did you ever find out from him what he did with the children?

A As far as I know, my husband came in.

Q As far as you know, your husband came to your stepfather. Do you know that your stepfather turned the children over to your husband?

A Yes.

Q I am asking if you know that. Do you know that?

A Yes.

Q Now, Mrs. Drope, can you tell me please what caused you to change your mind after the 12th of February, when you signed this affidavit, and made your determination that you wanted to go ahead and prosecute your husband?

A Because my husband tried to choke me, tried to kill me.

Q When was this?:

A Sunday night.

Q This past Sunday night?

A Yes, sir.

Q I see. That is when you made up your mind that you [62] wanted to prosecute him,—

A Yes, sir.

Q —is that right? And where did that occur?

A In my home.

Q On South Broadway?

A Yes, sir.

Q 79—what is it?

A 7918.

Q 7918 South Broadway?

A Yes, sir.

Q Mrs. Drope, had you called up your husband and asked him to come to see you at your home on Sunday night?

A No, sir.

Q You did not?

A No, sir. I would never do that.

Q Beg pardon?

A I would never do that.

Q And you never did that, of course?

A That's right.

Q Did you have a discussion with him on the telephone about some money that he had mailed to you for the support of the children and you said you didn't get it?

A Yes, sir.

Q And you asked him to bring that money and give it to you?

A He said he left the message with my mother. That is why he called. He said he would be there in the morning and bring the money down, which was twenty dollars.

Q And did he come there with the money?

A Yes, sir.

Q Now, was that the time he was supposed to have choked you?

A Sometime that next morning, 1:00 o'clock, sometime in the morning. He kept me up all night.

[63] Q Was this Monday morning you are talking about?

A Sunday night.

Q When was it when you talked to him on the phone? Was that Sunday morning?

A It was Sunday after—evening.

Q Pardon?

A It was Sunday evening when he called and said he would be by in the morning, and he came by.

Q He was by Sunday night?

A He said he would be by Monday morning.

Q Was there any specific time or set a time?

A No, sir.

Q You expected him then, I presume, about eight or nine o'clock on Monday morning?

A Yes, sir.

Q And did you have the children with you there then?

A Yes, sir.

Q And when was it that you turned the children over to your stepfather?

A It was that Monday.

Q The same Monday?

A After he had choked me.

Q What?

A After he had choked me.

Q He came there Monday morning and choked you?

A He came there Sunday night after he had called and said he wouldn't be there till morning. He came—

Q He came Sunday night?

A Yes.

Q Did he give you the money Sunday night or did he return on Monday morning?

A He gave me the money and he stayed there; he didn't return.

[64] Q did you ask him to stay?

A No, sir.

Q Did you tell him to get out, you didn't want him?

A Yes, sir.

Q And he didn't do it?

A No, sir.

Q Did you call the police?

A Yes, sir.

Q That night you called the police?

A Uh-huh.

Q To take him out? Did they come there that night?

A Yes, sir.

Q Did the police refuse to?

A They came there and he turned it around.

Q They came there and he turned it around. What do you mean by that?

A He said he just wanted to talk to me, and that is the way they left us. Dispute between—

Q That there was a dispute between you and your husband?

A Yes.

Q And had you told the police that he had choked you that night?

A He didn't do it then. It was after.

Q It was after that that he did?

A Yes, sir.

Q Tell me, where did you go then on Monday when you turned the children over to your stepfather?

A I went to a friend's house, a woman I know.

Q And how long did you remain there?

A Remained there for two days until I found a place.

Q You found a place to live?

A Yes, sir.

Q You moved away then from your mother's home; is that [65] correct?

A For the time being.

Q And you are living at that place now, are you, and have been since a week ago Tuesday or Wednesday?
A Yes.
Q A week ago today, is that right?
A Yes, sir.
MR. WATSON: I believe you may inquire. That is all, Your Honor. Pardon me. Just a minute, please.
Q (Mr. Watson) Mrs. Drope, could it have been Saturday night instead of Sunday night that Mr. Drope came there with the money for the children?
A No, sir.
Q It was Sunday night. You didn't see him at all on Saturday?
A Yes, he came by.
Q He was there on Saturday night?
A Yes, sir.
Q Did he give you money that time?
A No.
Q He did not. He didn't stay there Saturday night?
A Overnight, no.
Q He then returned on Sunday night, is that correct?
A Yes, sir.
Q Did you have a discussion about money Saturday night or Sunday?
A I believe Saturday night he said he would try to see that I had some money.
Q And then he brought some money there on Monday morning?
A Sunday night.
Q Sunday night. And he remained there then, and that was the time that the police were called?
A When he was [66] choking me.
Q And he said it was a family quarrel and things of that nature, and you didn't take any action, is that right?
A Yes, sir.
Q And he remained there the rest of that night until the next morning?
A He sure did. I was up all night.
Q You were up all night?
A Yes, sir.
Q Was he up all night?

A Yes, sir. He kept me up.
Q He kept you up?
A Yes, sir.
Q Well, then, did he leave on Monday morning or did you leave?
A He left on Monday morning. He said he was going to work.
Q And you left after that?
A Yes, sir.
Q And you turned the children over to your father-in-law or stepfather?
A Yes, sir. He was there when I left.
Q Did you tell him that you were going to get a baby formula for the children when you left?
A My stepfather knew exactly why I was leaving. Everybody knows.
Q Is that what you told him, you were leaving to get a formula for the baby?
A Yes, sir.
Q And you didn't return after that, did you?
A No, sir,—
MR. WATSON: That is all.
A —but my stepfather knew.
[67] MR. WATSON: Yes.

REDIRECT EXAMINATION

BY MR. FRANK:

Q Marianne, that Defendant's Exhibit "A", will you read that out loud, Marianne?
A (Reading) "Marianne Drope states that I do not desire to prosecute my husband James Drope on the charge of sodomy of which I complained to the police of the City of St. Louis on the date of January 17th, 1969. My reason for not proceeding with this prosecution is that I believe my husband is suffering from a mental condition. We have five small children. I further believe if my husband receives treatment for his mental condition from a psychiatrist, that he will be much better off than having been prosecuted for this offense."

Q Marianne, did he ever get any treatment for this condition after the initial visit to the psychiatrist?

A I could not tell you. As far as I know, no.

Q Marianne, the charge on this paper is sodomy. That is not what we are proceeding on. This is a charge of rape that we are proceeding on, isn't that right?

A Yes, sir.

Q Marianne, you stated that you talked with the Circuit Attorney about a month ago. What circuit attorney did you talk to a month ago? That was me, wasn't it?

A Yes, sir.

Q Where did you talke to me?

A In your office.

Q Is that upstairs or downstairs?

A Upstairs, I [68] believe.

Q Is that the Warrant Office we talked in?

A Yes.

Q Why were you at the Warrant Office?

MR. WATSON: Well, Your Honor please, I must object to that for the reason it is quite apparent that what the Circuit Attorney is asking, whatever she was at the Warrant Office for would be immaterial to any issue in this case.

MR. FRANK: Your Honor, it happens to be a part of this case, another defendant in this case, another one of the men.

MR. WATSON: Well, Your Honor, we are only trying this case. We are not trying any other case.

MR. FRANK: He asked about—

THE COURT: Pardon me. Just a minute. You better both step up here.

(The following proceedings were had out of the hearing of the jury:)

THE COURT: What is the probative value?

MR. FRANK: He raised the question seeing the woman thirty days ago. I saw the woman thirty days ago to swear out a warrant against the other man in the inquiry. That is all I want the jury to know; not even working on her husband's case at the time.

MR. WATSON: I can't see the—

THE COURT: Pardon me. I don't see the materiality [69] of this.

MR. FRANK: He raised the question.

THE COURT: What question?

MR. FRANK: He raised the question that I saw her thirty days ago.

THE COURT: Is there anything wrong with that?

MR. WATSON: I don't think there is.

THE COURT: You can argue it. It is your duty to interview witnesses before you put them on.

MR. FRANK: I wasn't interviewing her as a witness.

THE COURT: It makes no difference. You had a right to interview her. Let's proceed.

MR. FRANK: All right. Thank you.

(The following proceedings were had within the hearing of the jury:)

Q (Mr. Frank) Marianne, when you signed this document, whose office were you at?

A Mr. Lester Watson's.

Q You were at Mr. Watson's office?

A Yes.

Q Who was there at the office when you signed this copy?

A My husband and his secretary.

Q Nobody else with you?

A No.

Q Marianne, in the seven years you were married to James Drope, did he ever at any time have a blackout?

A Not to my knowledge.

Q During the seven years of marriage did he ever complain [70] of head problems that would cause a blackout?

A No more than bad headaches.

Q Did he ever say that he had blackouts?

A No, he never told me that.

Q During the seven years of marriage did you ever see him have a blackout?

A No.

MR. FRANK: No further questions.

RECROSS-EXAMINATION

BY MR. WATSON:

Q Marianne, when he fell down the steps, did he have a blackout?

A Not when he got right up, no.

Q You mean when he got down to the bottom of the steps? How many steps were there?

A Which one? I don't know which one he is referring to. It happened more than once.

Q Apparently from your answer it happened more than once, is that correct?

A Yes, sir.

Q Now, at different locations?

A Yes, sir.

Q Where did the first one happen that you can recall?

A Before I was married to him.

Q That would be some nine, ten years ago, is that right?

A Yes, sir.

Q And where was that, if you remember?

A It was at an apartment place where I used to live; I can't remember.

Q At an apartment where you used to live?

A Yes.

Q Can you recall how many steps were on that sairway?

A I can't remember exactly, no.

[71] Q Could you give us an estimate? Would you say as many as ten, or was it a long, high stairway or short?

A No, it was short.

Q Short. Approximately ten, would you say?

A Eight or ten, maybe.

Q Eight to ten. And he rolled down those steps, is that correct?

A Yes.

Q That is before you were married,—

A Yes, sir.

Q —nine or ten years ago? Now, how often has it occurred since that time?

A Maybe two or three times at the most.

Q Maybe two or three times at the most. When these things happened, was he drunk or just fall over and fall down the steps?

A Just when he didn't get his way,—

Q Pardon?

A Just when he didn't get his way, he would be a little nervous, and this would go on.

Q A little nervous and roll down the steps?

A Yes.

Q I believe you said—

MR. FRANK: Just a minute. I am going to object to that statement. Unless he wants to make a closing statement, I think it is improper.

THE COURT: All right. Overruled. Proceed.

Q (Mr. Watson) Mrs. Drope, when you came in the office to talk to me, and your husband introduced you, I was there, [72] and I think you said my secretary was there in the office; is that correct?

A Yes, sir.

Q And at that time we discussed this matter that occurred supposedly on the 17th day of January; is that right?

A Did we discuss it?

Q We discussed it, the three of us; you say you and your husband and I discussed it?

A You asked what happened.

Q And you told me?

A Yes.

Q So we discussed it?

A O.K.

Q Now, you were referring when you were in my office—you came there to talk to me, and you were referring to what occurred on the 17th of January, 1969, is that right?

A Yes, sir.

Q Whether it was sodomy, rape or anything?

A Both.

Q You were still talking about what happened on the 17th of January, is that right?

A Yes, sir.

Q Nobody threatened you, did they, in my office?

A No, sir.

MR. WATSON: I think that is all.

FURTHER REDIRECT EXAMINATION

BY MR. FRANK:

Q Marianne, before your husband took one of these falls—you said in about seven years of marriage you saw them three times. Before he took these falls, did he black out before he fell?

A No, sir.

Q After he fell, was he blacked out or in a state of [73] blackout?

A I am no doctor, but if he can get right up, I don't think he was out.

Q Marianne, when he got right up, did he remember falling down the steps?

A I never—as far as I know, I don't remember.

Q Did you talk to him about it?

MR. WATSON: I believe, Your Honor, the witness answered the question. Anything further along that line is argumentative.

THE COURT: What did she say?

MR. WATSON: She said she didn't know.

THE COURT: That was on the previous question. Overruled.

Q (Mr. Frank) Marianne, did you talk with him about the fall down the steps?

MR. WATSON: May we define when it was that this conversation is supposedly to have taken place?

THE COURT: He said any time.

A Before we were married, the first time it happened, I asked him. He was all right as soon as he got up. Of course, I was afraid. So I asked him. I said, "Do you want me to get some help?" He got right up and said he was all right. So, because he couldn't be that much

wrong when he got right up and started walking around and said he was all right.

Q (Mr. Frank) Marianne, does your husband do a lot of [74] drinking?

A Well, I believe he does. I can't say for sure. Maybe quite a bit since we have been separated. Like I said, we were separated quite a bit.

Q That particular night, January 17th, was he one of the ones that smelled of liquor?

A Yes, sir.

MR. FRANK: I have no further questions.

MR. WATSON: No further questions, Your Honor.

THE COURT: All right. You may step aside. Call your next one.

MR. FRANK: Call Ruth McKnight.

MR. WATSON: Your Honor, please, we are going to object to any testimony from this witness because she was not endorsed by the State until the 19th of June. We didn't receive notice of it until Saturday. We have had no opportunity to take her deposition or know what her connection is in any manner with this.

MR. FRANK: Is he trying to make a speech or trying—

THE COURT: Pardon me. Just a minute. He has a right to make his objection, Mr. Frank.

MR. WATSON: I therefore, if your Honor please, object to any testimony on behalf of this witness.

THE COURT: All right. Be overruled.

* * * *

[93] (Thereupon, on Tuesday, June 24, the further hearing of the above-entitled cause was laid over to the following day, Wednesday, June 25th, 1969, at 9:30 A.M.)

(Thereafter, on Wednesday morning, June 25th, 1969, the jury and counsel for the respective parties again appeared in open court. The defendant, James E. Drope, did not appear in person in open court at this time or any other time during the progress of the trial of the above-entitled cause. The follow-
[94] ing proceedings were then had in said cause, in the absence of the defendant:)

THE COURT: Good morning, members of the jury. We were delayed through no fault of either the Court or the attorneys in this case. I just want to let you know that. * * *. You may proceed.

MR. WATSON: Your Honor, at this time I am going to move for a mistrial in view of the fact that the defendant, I am informed, shot himself this morning.

MR. FRANK: Wait—

MR. WATSON: I am addressing the Court.

THE COURT: Wait.

MR. WATSON: The defendant, I understand, shot himself this morning. He is in the City Hospital being operated on.

THE COURT: Just a minute. The Court already decided that the matter would proceed for trial.

MR. WATSON: Your Honor, it makes it awful difficult for me to go to trial without the client.

THE COURT: That is the difficulty, Mr. Watson, that your client brought about, not you, not the Court. He was on bond and his responsibility to be here. So the Court will proceed with the case.

MR. WATSON: My motion then is overruled, Your Honor?

THE COURT: Yes.

* * * *

[128] (The following proceedings were had out of the hearing of the jury:)

THE COURT: The State rests?

MR. FRANK: At this time, Your Honor, the State concludes its case and the State rests its case at this time. We ask that the exhibits presented, "13", "14", "15" and "16" be admitted into evidence.

THE COURT: All right. They will be admitted into evidence except those portions of the hospital records to which the Court sustained an objection.

MR. WATSON: Your Honor, I want to present this to [129] you.

"MOTION FOR VERDICT OF ACQUITTAL"

"The Court instructs the jury at the close of the State's case that the State of Missouri has failed to produce sufficient testimony to sustain the allegations in the Indictment that the defendant unlawfully, feloniously and forcibly did rape, ravish and carnally know the prosecuting witness against her will in that the Prosecuting witness and the Defendant are husband and wife.

"The Defendant not being charged with aiding and abetting in the rape of Mary Joyce Drope.

"The Court should have declared a mistrial when Defendant moved for same, when it became apparent that the Defendant shot himself and could not further attend the trial as he is confined as a Patient in the City Hospital of St. Louis No. 1, therefore depriving him of being confronted by his accusers as he is being tried in absentia.

"Therefore, Defendant requests the Court for a Verdict of Acquittal."

Filed June 25, 1969.

THE COURT: All right. Let the record show that the defendant filed a motion for a verdict of acquittal, and also again renews in effect his motion,—

MR. WATSON: That's right, Your Honor.

THE COURT: —and both of which will be overruled.

[130] MR. WATSON: And then there will be nothing further, Your Honor.

(The following proceedings were had within the hearing of the jury:)

THE COURT: All right. That is the State's case, Mr. Watson.

MR. WATSON: Your Honor, I have no evidence to produce at this time under the circumstances. So I must rest.

* * * *

[138] "The Court instructs the jury that any verdict that you render, before it can be received as a verdict, must be unanimous; that is, it must be agreed to by every juror, it is not the verdict of the jury unless it

is the verdict of each juror as an individual, as well as of the jury as a whole."

VERDICT OF THE JURY

(After the summation of the case to the jury by counsel for the respective parties, the Court submitted said cause to the jury for their deliberation and verdict. The jury then retired to the jury room. Thereafter, on the same day, the said 25th day of June, 1969, the jury returned into open court the following verdict:)

THE COURT: Members of the jury, have you arrived at a verdict?

JURORS (in union): Yes.

THE COURT: And the foreman—who is the foreman?

MR. ZAVADIL: Mr. Zavadil.

THE COURT: You have the verdict and forms of verdict?

MR. ZAVADIL: Yes.

THE COURT: All right. Hand them to the Sheriff.

(Thereupon, the verdict was relayed to the Court for its examination and inspection)

THE COURT: All right.

THE CLERK: Will the jury please rise and hear their verdict. (Reading the verdict)

[139] "VERDICT"

"Circuit Court of the City of St. Louis, No. 19. June 25, 1969

STATE OF MISSOURI	)	On Indictment
v.	)	for Rape
JAMES EDWARD DROPE	)	(Forcible)

"We, the jury in the above-entitled cause, find the defendant guilty of Rape.

"/s/ John Zavadil
Foreman."

THE COURT: Members of the jury, is that your unanimous verdict?

THE JURORS (in unison): Yes.

THE COURT: Is there any dissent at all from the verdict?

JURORS: No.

THE COURT: Do you wish the jury polled?

MR. WATSON: Yes, if your Honor please.

(Thereupon, the jury was polled, and upon the Clerk asking each juror, "Is the verdict I have just read your verdict?", each and every juror responded in the affirmative.)

THE COURT: Very well. The verdict will be received, and the judgment of the court will be reserved on the motion for a new trial. The Court will set the punishment, and will not do so at this time. However, the bond is canceled, and the Sheriff is ordered to take custody of the defendant as a [140] prisoner of the Sheriff. And the jury will be discharged, with the thanks of the Court for your patience. * * *.

TIME TO FILE MOTION FOR NEW TRIAL ENLARGED.

MINUTE ENTRY—June 25, 1969:

"Defendant's bond set at $25,000. Defendant granted thirty days additional time to August 4, 1969, to file motion for a new trial. Leave granted. Court sets date as July 14, 1969, for fixing of penalty."

PENALTY FIXED.

Thereafter, on July 21, 1969, the following proceedings were had in said cause. Mr. Michael Frank, Assistant Circuit Attorney, appeared for the State of Missouri. Mr. James Edward Drope, the defendant, appeared in person in open court and in the presence of his attorney, Mr. Lester Watson.

THE COURT: You are James Edward Drope?

MR. DROPE: (Nodding assent).

THE COURT: Cause No. 405-R. And on June 25th the jury returned a verdict of guilty of rape. And it is incumbent upon the Court to fix the penalty in view of the fact that you have been previously convicted of a felony. And this is not a final sentence. This is merely the fixing of the penalty in the case, and the Court now fixes the penalty at life imprisonment.

MR. WATSON: Your Honor, before—very well.

[141] THE COURT: And you have, according to the file, to refresh your memory,—

MR. WATSON: Until the 4th of August?

THE COURT: —until August 4th to file a motion.

MR. WATSON: That's right, Your Honor.

MR. DROPE (The Defendant): Life?

MR. WATSON: Life.

MR. DROPE: For something I didn't do?

THE COURT: Your attorney will talk to you. You better go and talk to him.

(Thereupon, the defendant was remanded to the custody of the Sheriff.)

"MOTION FOR A NEW TRIAL"

(Caption, signature and formal parts omitted)

"Comes now Defendant herein and moves the Court to set aside the verdict of the jury finding the Defendant Guilty for the following reasons, to-wit:

"1. That the Court erred in failing to sustain Defendant's Motion for a verdict of Acquittal at the close of the State's case, as the State failed to produce sufficient evidence to sustain the Indictment, in that Defendant was not charged with aiding and abetting others in the commssion of the crime of rape and he, himself, could not be charged with raping his own wife.

[142] "2. That the Court erred in permitting the State to proceed with the prosecution of the Defendant, in absentia, as there was no evidence produced on behalf of the State to show that Defendant was absent from his

trial by reason of his own actions or that he deliberately absented himself from said trial.

"3. That the Court erred in compelling the completion of the trial in the absence of the Defendant for the reason that it deprived Defendant from being confronted by his accusers or witnesses against him and also deprived Defendant's counsel of consulting with said Defendant during the trial.

"4. The Court erred in compelling the completion of the trial in the absence of the Defendant in that it deprived the Defendant from taking the stand and offering his defense to the charge of rape and prevented the Defendant from producing witnesses to substantiate Defendant's testimony.

"5. That the Court erred in failing to declare a mistrial when the Court was advised of the Defendant's inability to be present in the courtroom during the trial, as Defendant was being operated upon in the City Hospital in the City of St. Louis.

"6. The Court erred in giving the Instruction on credibility of witnesses, as no witness's credibility was challenged and, in giving said Instruction, the Court indirectly commented upon Defendant's failure to take the witness stand.

[143] "7. That the verdict of the Jury is against the law and the evidence, in that the Court should have sustained Defendant's Motion for a mistrial when it was apparent to the Court that the Defendant could not physically be present for the completion of the testimony offered by the State and Defendant was deprived of being able to be confronted by his accusers or witnesses against him.

"8. That the Court erred in permitting the Jury to return a verdict of Guilty in the absence of the Defendant in the Courtroom because of his inability, not brought upon himself, to be there.

"9. That to proceed with the case in absentia is in violation of Rule 29.02 of the Rules of the Supreme Court of the State of Missouri which provides 'No person shall be tried upon an indictment or information for a

felony unless he be personally present during the trial'

. . . .

"10. That the Court erred in permitting the Jury to return a verdict and entered same upon the records of the Court in the absence of the Defendant when there was no testimony on behalf of the State or Defendant that such absence was willful or voluntary upon his part.

"11. That the Court erred in permitting the trial to continue in the absence of the Defendant when there was no evidence that the Defendant voluntarily absented himself from the courtroom and, as a matter of fact, he did not voluntarily absent [144] himself from the courtroom.

"12. That the verdict of the Jury is against the law under the evidence that the Defendant was absent from the courtroom during a portion of the trial and said absence was not brought on by his own acts or willingness.

"13. That the Court's sentence of life imprisonment in the Department of Corrections in the State of Missouri is inhuman, cruel, excessive and unusual punishment under the circumstances and in violation of Article VIII of the Bill of Rights of the Constitution of the United States and in violation of the Constitution of the State of Missouri.

"14. For the above reasons, the Defendant moves the Court to set aside the verdict of the Jury and to grant the Defendant a new trial."

Filed July 30, 1969.

HEARING ON MOTION FOR NEW TRIAL.

(Thereafter, on September 19, 1969, defendant's motion for a new trial came on for a hearing during which the following proceedings were had: The defendant, James Edward Drope appeared in person in open court and with this attorney, Mr. Lester Watson. At the beginning of the hearing there was no representative of the State present in open court.)

THE COURT: Mr. Watson, Mr. Frank wants to know if you are going to have any evidence in the case?

MR. WATSON: Yes, I am, Your Honor.

[145] THE COURT: He is taking a deposition, and he didn't know that there was going to be any testimony, and he is in the middle of the deposition, and a reporter there. He is asking the Court that yours be continued. He wants to know what the evidence will be so that he will be able to get witnesses in. Now, what it means—

MR. WATSON: I don't believe at this time the defendant should be compelled to disclose his evidence.

THE COURT: All right. We will hear part of it and continue it and give them an opportunity to bring in any evidence they have.

MR. WATSON: If you want to do that this morning.

THE COURT: All right. (Addressing the reporter) Mr. Utrup, this is the case of State of Missouri v. James Drope; Cause No. 405-R. Mr. Watson is here. Mr. Michael Frank, representing the State, is here, and the defendant is here.

On the record, Mr. Watson announces that he wants to produce evidence and make a record with reference to certain allegations on a motion for a new trial. The State, through Mr. Frank, has requested the Court for a continuance so that he would be able to produce evidence contrary to what he understands to be the issue with reference to any evidence. And that goes to paragraphs 2, 3, 4, 5, 7, 8, 9, 10, and 12, with reference to the defendant's absence from court. And Mr. Frank [146] has requested the Court for a continuance so he can obtain witnesses on behalf of the State that the absence is not any fault on the part of the State but due to the defendant's own fault. And the Court requested Mr. Watson what his evidence would be, and he said he wouldn't like to state in advance. So the Court suggested that we hear Mr. Watson, and if the State asks for a continuance, they will be given an opportunity to produce additional evidence.

MR. WATSON: Will you take the stand. I might state to the Court at this time that the testimony being offered by the defendant is solely and only for the purpose of clarifying the record as to his inability to be present in the courtroom at the time that the case was being tried in his absence.

JAMES EDWARD DROPE, sworn, testified:

DIRECT EXAMINATION

BY MR. WATSON:

Q Now, will you state your name, please?
A James Edward Drope.
Q Where do you live, Mr. Drope?
A Well, I was staying with my parents at the time.
Q What is their address?
A Well, it was 630 East Red Bud.
Q That is in the City of St. Louis?
A Yes, sir.
Q Now, then, at the present time you are confined in the City Jail, is that right?
A Yes, sir.
Q And you have been since you returned from the hospital [147] some time in—was that July or early August?
A I believe it was July.
Q July?
A July.
Q Now, Mr. Drope, you were present in this courtroom on the 23rd day of June, at the commencement of your trial; is that correct?
A Yes, sir.
MR. WATSON: I assume, Your Honor, that that date is right. I am not looking at the information, but I believe you have the file ther.
THE COURT: Well, the file—
MR. WATSON: The case—I mean, did the case start on the 23rd?
THE COURT: Pardon me.
MR. WATSON: Did the case start on the 23rd?
THE COURT: Will you let me make a statement. The file shows that the case was assigned to Division No. 19, and the defendant present in court, and his attorney, Lester Watson. And it goes on and later on it says, "Examination of jurors on voir dire begun on June 23rd.
MR. WATSON: Thank you.

Q So you were here and present in this courtroom when I examined the jury on the 23rd day of June, 1969; is that right?

A Yes, sir.

Q Now, then, and you were here also on the next day during the trial, were you not?

A Yes.

[148] Q Now, then, Mr. Drope, you were not present here on the 25th, is that correct?

A That's correct, sir.

Q Now, on the evening of the 24th you went home from the courtroom?

A Yes, sir.

Q And then the next morning, will you tell the Court, please, what happened on the next morning? What did you do the next morning, if anything?

A The next morning I was at my—

MR. FRANK: I can't hear you.

MR. WATSON: Speak loud so Mr. Frank can hear.

THE WITNESS: Yes. I have a cold.

A I was at my parents' house. I went over to my brother's house. I think it is 6238 Bulwer, started to get a change of clothes,—

Q All right.

A —saw my children before I came to court.

Q Were your children at your brother's house?

A Yes, sir.

Q All right. Proceed.

A My mother told me to get a change of clothes. All my clothes were down in the basement. So I went down in the basement to get my clothes. I got my clothes down and I turned the light out, and that is when I started not remembering.

Q What is the next thing you remember after that?

A Being in Homer Phillips Hospital.

[149] Q And you remember being at Homer G. Phillips Hospital, is that right?

A I asked the nurse where I was, and she told me I was at Homer G. Phillips Hospital.

Q And did you remain in the Homer G. Phillips Hospital after that or were you sent to the City Hospital on Lafayette, if you know where you were?

A The only hospital I can remember being at was the Homer G. Phillips Hospital.

Q Homer G. Phillips Hospital?

A Yes.

Q Were you operated on there on the morning of the 25th of June, 1969?

A Well, all I know is what I was told. I was told I was operated on at the City Hospital.

Q At the City Hospital?

A Yes.

Q And you don't know whether they were referring to the Homer G. Phillips or the one on Lafayette?

A That is all I know.

Q That is all you know about it. Now, Mr. Drope, did you on that day take a gun and deliberately shoot yourself that you know of?

A I don't remember a thing. It happened after I turned the light out.

Q Did you do anything to prevent you from coming into this courtroom to attend your trial?

A No, sir.

MR. WATSON: I believe that is all, Your Honor.

MR. FRANK: Your Honor, the State asks the Court to let the State reserve its cross-examination and continue it for the State to bring in witnesses.

[150] MR. WATSON: Your Honor, I am going to object at this time. I believe Counsel could complete the cross-examination now. And I would naturally object to any testimony that the State would bring in at this time that they should have brought in on the 25th of June so there would be a record and the Court would be informed as to what occurred or what their contention was. At this time in support of our motion for a new trial there is no evidence in the record whatever as to what happened to the defendant. And I believe it was the burden of the State, and that is my argument in my motion that it was their duty at that time to bring in and put into the record some evidence, so that if this matter goes

to an appellate court, the court could be informed as to why the case went on in absentia, the defendant being absent.

THE COURT: Very well.

MR. WATSON: I have no objection to him cross-examining the defendant now, and I would recommend that it be done now. I think it is only fair to the defendant that it is done now.

THE COURT: Of course, also in fairness to the State, not knowing there was going to be any testimony offered.

MR. WATSON: Well, they had a copy of the motion for a new trial.

THE COURT: That doesn't necessarily follow there is going to be any testimony. It is your position it was their [151] duty to present evidence?

MR. WATSON: Oh, absolutely.

THE COURT: If that is true, if your position is true, if a defendant disappears it is up to the State to investigate why he is not here, and it is up to the Court and the jury to wait until the State completes its investigation, and it is a locked-up jury, that means that everybody is sitting down. I don't know; it seems to me it is up to the defendant to account for his absence. He is on bond. The State couldn't follow him around. They would be severely criticized if they did. It would seem to me that the burden of proof is upon the defendant to show his absence, not the State.

MR. WATSON: Well,—

THE COURT: It seems to me, Mr. Watson, that would unnecessarily delay cases. It would have the Court and jury—

MR. WATSON: I don't think so.

THE COURT: —sit around while the State completed its investigation. All kind of complications. Let me say this; let me say this: It seems to me, if your position is correct, and I took it from the statements made, then the person—it could have been presented on a motion for a new trial, that there was no accounting

for his absence on the part of the State, therefore it could be presumed that he was not here because through no fault of his own, he was absent through [152] no fault of his own and therefore the motion should be sustained. At least, Mr. Frank, did you know that there was going to be any evidence offered?

MR. FRANK: Today? No, I had no knowledge of this at all.

THE COURT: Well, I am going to grant it. The State wouldn't even be in a position to cross-examine until they checked.

MR. WATSON: They could cross-examine on what was brought out on direct, Your Honor.

THE COURT: Didn't you have your investigator check down at City Hospital?

MR. FRANK: Yes, sir, my investigator personally went to City Hospital.

THE COURT: And got a police report?

MR. FRANK: That is correct.

MR WATSON: And saw the man in the hospital on the operating table, but that was never produced here in evidence. That should be in the record.

THE COURT: Well, the Court got a telephone call from his brother—his father-in-law.

MR. WATSON: You and I were here together. That is true, but nevertheless that is all hearsay.

THE COURT: Well, it is.

MR. WATSON: What the Supreme Court is going to be [153] interested in.

THE COURT: I think the State is entitled under this to a continuance, and also entitled to continue their cross-examination, but you will be limited to what he stated on direct.

MR. FRANK: On direct, Your Honor.

THE COURT: All right.

MR. WATSON: All right. Then I presume we won't go ahead with the motion for a new trial this morning.

THE COURT: I don't see where anything can be gained.

MR. WATSON: I have a number of cases to support my contention.

THE COURT: Do you have any other evidence?

MR. WATSON: No, Your Honor, that is all.

THE COURT: When do you want to continue it to?

MR. WATSON: I would say two weeks from today if that is convenient to the Court. I am going to be away from the 9th of October to the 29th. So it could be two weeks from today, Your Honor, or if you want to make it a week from today, whatever is convenient.

THE COURT: Pardon me. Let's declare a short recess. Let me look at my docket.

(Court in temporary recess)

* * * *

THE COURT: The matter of the motion for a new trial will be continued to October 3rd.

[154] (Thereupon, the further hearing on defendant's motion for a new trial was laid over to October 3rd, 1969. Thereafter, on October 3rd, 1969, the parties again appeared in open court, the defendant appearing in person. The further hearing then was resumed, as follows:)

THE COURT: I believe that you completed the direct examination.

MR. WATSON: Yes, Your Honor.

THE COURT: All right. (Addressing the defendant) Will you take the stand.

MR. FRANK: My the record show at our request that all witnesses be excluded from the courtroom?

THE COURT: Yes. All right.

CROSS-EXAMINATION

BY MR. FRANK:

Q For the record, please state your name?
A James Edward Drope.
Q Speak louder, Mr. Drope, so I can hear you.
A James Edward Drope.

Q I believe you testified on direct examination that you went to visit your brother on June 25th, 1969, the morning?

A My mother and I and my stepfather went over to see the kids before coming to court, and they changed clothes before coming to court.

Q Do you remember going to the garage that morning?

A No, sir.

[155] Q You don't remember going to the garage?

A No, sir.

Q All right. You testified the last time you were on the stand that the last thing you remembered entering garage and going toward the light. You are telling us now that you don't remember going to the garage?

MR. WATSON: Your Honor please, I think he is mistaken. He testified that he went to the basement as I recall it.

THE COURT: Well, he can state that he didn't say that. I can't recall.

A I didn't say anything about going to no garage.

Q (Mr. Frank) Do you remember getting yourself injured on that day?

A I remember going to the basement like I said before.

Q I said, do you remember being injured on that day, your stomach was injured in some way?

A I remember feeling something hot hitting my stomach, that is all I remember.

Q What is the next thing you remember?

A When I come to in the hospital.

Q Was that after they had operated on you?

A Yes, sir.

Q How late in the day was that?

A I really couldn't say for certain.

Q Isn't it a fact you told your mother—her name is Frankie Dewey—you were going to shoot yourself if you had to [156] come to court that day and testify?

MR. WATSON: Your Honor,—

A No, sir, I didn't.

MR. WATSON: Wait a minute. It is beyond direct examination, and as I recall, the Court informed the

State at the last hearing that he must maintain his questions within the scope of direct examination.

THE COURT: Well, pardon me. This goes to what he testified to on direct. It is contradictory.

MR. WATSON: He didn't testify that he talked to his mother—

THE COURT: Overruled.

MR. WATSON: —or anyone else, Your Honor.

MR. FRANK: Do you remember the question?

THE WITNESS: Would you mind repeating it?

MR. FRANK: Would you read the question, please.

THE REPORTER: (Reading) "Question: Isn't it a fact that you told your mother—her name is Frankie Dewey—you were going to shoot yourself if you had to come to court that day and testify?"

A No, sir, I don't recall saying anything of any sort to my mother.

Q (Mr. Frank) Isn't it a fact you told your brother Homer if you had to come to court and testify that day, you were going to shoot yourself?

[157] MR. WATSON: Same objection, your Honor.

THE COURT: Overruled.

A I said no such thing.

Q (Mr. Frank) Do you own a rifle?

A No, sir.

Q You don't own a rifle?

A No, sir.

Q You own no weapon?

A No, sir.

Q Do you know a patrolman Jerome Dampier?

A No, sir.

Q You don't know Patrolman Dampier?

A I don't recall that name.

Q Isn't it a fact you talked to Patrolman Dampier at the hospital?

A No, sir, not that I remember.

Q Do you tell the Court you did not talk to Patrolman Dampier?

A Not to my knowing, I didn't talk to anybody.

Q Isn't it a fact that you told Patrolman Dampier while you were on the operating table in the emergency

room—on the table in the receiving room that you would rather be dead than testify in the case, and that is the reason—

MR. WATSON: Now, just a minute.

MR. FRANK: Let me finish the question. This is the question.

MR. WATSON: Pardon me.

Q (Mr. Frank) —and that the reason that you shot yourself in the stomach so you would not have to testify? [158] MR. WATSON: Now, if Your Honor please, I am going to object to that again because it is beyond the scope of direct examination.

THE COURT: It will be overruled.

MR. FRANK: Will you answer the question.

A I don't even remember being in the hospital until I woke up in Homer G. Phillips.

Q It is my understanding you deny talking with the Officer?

A Yes, sir.

Q And you deny telling him that you shot yourself with that rifle?

A I don't remember talking to anyone, any officer. I don't remember talking to anyone.

MR. WATSON: Your Honor please, may I make an objection to this line of questioning at this time for the reason if the State intends to offer this testimony, it should have been offered to the Court before the case went on to be heard with the defendant in absentia. I am objecting in addition for the reason.

THE COURT: Be overruled.

Q (Mr. Frank) Didn't you keep your rifle in the basement at your brother's house with the rest of your clothes? Isn't that where you were keeping your clothes?

A May I ask what rifle?

Q I am asking you a question. Isn't that where you were keeping your clothes, in his basement?

A Yes, sir, that [159] is where I had all my clothes and my children's clothes.

Q And all your possessions, is that right?

A That is all I had down there.

Q Isn't it a fact you went to that basement first to get that rifle and then you walked in the garage where you shot yourself with it?

A Like I said before, I went to the basement to change clothes.

Q What is the last thing you remember then?

A When I got my clothes out and turned the light out and turned around, that is the last I remember.

Q You say you turned the light out?

A Yes, sir.

Q The Court has the record. You testified the last time you don't even remember turning the light out?

MR. WATSON: I submit that is argumentative.

MR. FRANK: It is in the record.

THE COURT: Well, he can state whether he remembers so testifying.

A Like I stated before,—

Q (Mr. Frank) Do you remember testifying—

MR. WATSON: Just a minute. If your Honor please, I submit the witness has a right to answer.

THE COURT: No, he has the right to have the question answered. Do you remember testifying the last thing you remember was turning the light out?

A The last I remember, turning that light out and turning [160] around, and that was the last I remember, and a hot burning sensation in my stomach.

Q (Mr. Frank) You don't remember telling your mother or your brother or the policeman that you shot yourself so you wouldn't have to come to court?

A No, sir.

Q Do you remember at the hospital talking with the doctors about how you were shot?

A I remember talking to some of the doctors asking what had happened.

Q Do you remember telling them that you shot yourself in the stomach with a rifle so you would not have to come to court and testify?

A No, sir, I don't remember saying no such thing to them.

Q You never told the doctors in any event?

A I only repeated what I had heard.

Q I am asking you, did you tell the doctors you had shot yourself?

A No, sir.

Q Because you didn't want to go to court? Is your mother's name Frankie Dewey?

A Yes, sir.

Q Your brother's name is Homer H.

A Yes, sir.

Q Do you remember seeing them prior to the shooting that morning?

A I remember talking to them upstairs, yes, sir.

Q Do you remember talking to them after the shooting while you were still there?

A No, sir.

Q You don't remember talking to anybody after the shooting?

[161] A No, sir.

Q What time did they operate on you that day?

A I don't know.

Q Was it nighttime?

A I don't know.

Q You don't even remember?

A I don't even remember that I went to the hospital.

MR. FRANK: I have no further questions.

MR. WATSON: I have no questions, Your Honor.

THE COURT: All right. You may step down.

MR. FRANK: Your Honor, at this time the State wishes to call—

THE COURT: Oh, pardon me. Have you finished?

MR. WATSON: Yes, Your Honor, I have finished.

THE COURT: All right.

MR. FRANK: The State is ready.

THE COURT: All right. You may proceed.

MR. FRANK: At this time the State wishes to call Frankie Dewey.

STATE'S CASE ON MOTION

FRANKIE DEWEY, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Please state your name.
A Frankie Dewey.
Q Where do you live?
A 630 East Red Bud.
Q Is James Drope your son?
A Yes, sir.
Q Did you see your son on June 25th, 1969?
A I sup- [162] pose I did.
Q The morning he was shot?
A Yes, sir.
Q Did you see your son after he had been shot?
A I saw him laying on the ground.
Q Did your son talk to you at that time?
A No, sir. He couldn't.
Q Are you telling the Court that your son said nothing to you at that time?

MR. WATSON: Just a minute. Your Honor please I am going to object to that as argumentative. This is Mr. Frank's direct examination of his own witness. I object to him arguing with her.

MR. FRANK: Your Honor, at this time I ask that this witness be declared a hostile witness on the basis of the official police report of the St. Louis Police Department would show a statement to the contrary that this witness made.

MR. WATSON: I don't know about any police report.

THE COURT: Well,—

MR. WATSON: I move whatever reference he made to the police report be stricken.

MR. FRANK: That is the reason for asking for the hostile witness proceeding.

THE COURT: Be overruled.

Q (Mr. Frank) Isn't it a fact, mam, that your son told you after he had been shot, after he shot him-

self that he had [163] shot himself so that he would not have to come to court that morning?

A No, sir, that is not true.

Q Isn't it a fact, mam, that you told Police Officer Dampier that your son told you that he had shot himself so he would not have to come to court that morning?

A I did not.

MR. WATSON: I have to object to that,—

A I am taking an oath today; I did not.

MR. WATSON: Just a minute, Mrs. Dewey. I would have to object to that, Your Honor please, for the reason it would be hearsay.

THE COURT: Be overruled. It is the statement of this witness?

MR. FRANK: That's right.

THE WITNESS: I did not say it.

MR. WATSON: Third party.

THE COURT: It is an effort to show a contradictory statement. All right. Proceed.

Q (Mr. Frank) Isn't it a fact that prior to this occasion your son had also told you on numerous occasions that he would rather kill himself than testify before the jury?

MR. WATSON: I object—

A No, sir. I don't know who told you all that but it is not true.

Q (Mr. Frank) Isn't it a fact that your son James Drope [164] kept his clothes and all his belongings in the basement of your other son's house?

A Part of his clothes was over there because we was washing over there.

Q Isn't it a fact that is where he kept his rifle also?

A That rifle, I hadn't seen that thing in years and I thought it was in the country. I did not see that rifle.

Q That was Jimmie's rifle, wasn't it?

A No, it was not.

Q It wasn't?

A And I didn't tell the police officer that either.

Q And you didn't tell the police officer either?

A Because I bought those rifles a long time ago.

Q Whose rifles were they?

A They belonged to my youngest son.
Q Who is he?
A Donald.
Q Donald?
A Either belonged to Donald or Homer; two rifles just alike.
Q That was Homer's house where that rifle was?
A That's right. That is where it was when it was in the garage.
MR. FRANK: I have no further questions.
MR. WATSON: I have no questions, Your Honor.
THE COURT: (Q) Did you say the rifle was in the garage?
A That is where we found it, sir, and he was laying out- [165] side the garage.
THE COURT: All right.
MR. WATSON: Step down, Mrs. Dewey.

(Witness excused)

FRED H. SCHIEFELBEIN, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Please state your name, sir?
A Fred H. Schiefelbein.
Q What is your business or occupation?
A Clerk in the Record Section, Metropolitan Police Department, City of St. Louis.
Q And, sir, did you bring anything with you?
A I brought records in answer to a subpoena duces tecum.
Q And are these the records of a shooting, suicide attempt, on June 25th,—
MR. WATSON: Just a minute. I am going to object. Just a minute. I am going to object, if Your Honor please, for the reason that is leading and suggestive and it is attempting to place into evidence something that is not—

THE COURT: He hasn't offered it yet. It will overruled, but you just ask him what they are.

MR. WATSON: That wasn't his question, Your Honor.

THE COURT: What was his question?

MR. WATSON: The question was, he is talking about an attempted suicide and things of that nature, Your Honor, to which I object.

[166] THE COURT: Well, this is just a description being used in that sense. All right.

Q (Mr. Frank) Is there a heading on that police report that shows the type of police report it is, sir?

A Yes, sir.

MR. WATSON: Your Honor please, I am going again to object to it because that is merely a self-serving document.

THE COURT: I am not going to make him a record. I am going to let him identify it. I don't know what it is unless it is identified. We are not trying it before a jury.

MR. WATSON: I know, but he is talking about what heading was placed on the report.

THE COURT: Just for the mere report for identification. It is not going to have influence on the Court.

Q (Mr. Frank) For identification purposes, what is the heading on the report?

A "Injury and Sick Report, Attempted Suicide".

Q What is the date of the report?

A 6/25/69.

Q The time?

A 8:16 A.M.

Q Is that the time it was reported to the police?

A Sixth District.

Q Who reported that attempted suicide to the police?

A A person by the name of Dewey. I don't know if that is a surname or what. That is all it has on it.

MR. FRANK: May the record show that the Dewey being [167] the mother of the defendant.

MR. WATSON: Just a minute. There are also other Deweys besides Mrs. Dewey.

THE COURT: I know that. All he is showing that Dewey is the name of the mother, and we already know that because she has testified.

MR. WATSON: We know that.

Q (Mr. Frank) Who are the officers that prepared that report?

A Dampier.

Q Is he Patrolman Dampier?

A Yes, sir; Jerome.

Q Of the Fifth District?

A That's right.

Q And, sir, is this record kept in a normal course of business?

A It is.

Q Is it a part of your responsibility to keep these records?

A That's right.

MR. FRANK: Your Honor, at this time the State wishes have have marked as State's Exhibit 1 the actual police record which shows the attempted suicide in this case.

MR. WATSON: Your Honor please, I certainly object to Counsel—

THE COURT: No, he can mark it, but—

MR. FRANK: All I am doing is marking it at this time.

(The reporter thereupon marked a police report for identification as State's Exhibit 1.)

THE COURT: He can mark it. He can make an offer of [168] proof.

MR. WATSON: That's right.

THE COURT: The Court will rule at the proper time.

MR. FRANK: I have no further questions at this time of this witness, Your Honor.

CROSS-EXAMINATION

BY MR. WATSON:

Q Mr.—I am sorry.

A Schiefelbein.

Q Schiefelbein, is that right? The records that you have, that have been just marked for identification, are the records of the Police Department made by some officer, is that correct?

A By—in many cases there are several officers in the report. In most cases it is one officer.

Q This particular one, is it made by one officer?

A Yes, sir.

Q And what was the officer's name?

A Dampier.

Q Now, of course, this information that is in there is a document held by your—made for your Police Department for their records, is that correct?

A If I may explain, the officer, after he gets whatever information he needs, he makes a report to his commanding officer. And there is a sergeant in charge if the lieutenant or captain is not in there, that person's name appears as having witnessed the report of the officer. It is really a report of an incident to the Chief of Police which must be made all the time.

Q But this particular document is not made by Officer [169] Dampier; it is made out by a detective sergeant or somebody there at the police station?

A No, sir, he makes it out and the detective sergeant verifies that this officer made it out.

Q In other words, he writes it—Dampier writes it and the other officer verifies it?

A That is true. If you care to look, this is what I mean (pointing on report). This is the officer in this block; and this is the supervising officer on this end (pointing). And that is a part of the police procedure. It must be—every incident must be accounted to the Chief of Police, whether he looks at it or not.

(Off-the-record discussion)

THE WITNESS: This is Dampier all the way, submitted by Officer Dampier.

Q (Mr. Watson) I see. The lower part of page one of this report was made out by a Sergeant Leo Sneedmeyer, is that correct?

A No, sir, he is the one that supervised the report. It was made out by Patrolman Jerome Dampier whose serial number in the Police Department is 6604.

Q Well, let me read it to you. It reads: "At about 8:16 this date Patrolman Jerome Dampier, 6604, in charge of Car No. 5, was directed to 5248 Bulwer." Now, who was it that wrote that in there? Is that Sneedmeyer's notes or records?

A No, sir, that is the police officer's.

Q In other words, that is the police officer talking [170] about himself, is that correct?

A Yes, sir.

MR. WATSON: All right. Thank you.

(Witness excused)

MR. FRANK: Your Honor, I would like to call the medical records librarian from City Hospital No. 1.

NORMA SNOWDEN, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Mam, please state your name.

A Norma Snowden.

Q Miss Snowden, what is your business or occupation?

A Clerk at the St. Louis City Hospital, 1515 Lafayette, in the Medical Records.

Q And as a clerk in Medical Records, what are your responsibilities?

A Ah, to answer to summonses and to keep the medical records.

Q And did you in fact bring something with you today from that hospital?

A Yes, I did.

Q What did you bring with you, mam?
A X rays and a medical chart on one James Drope.
MR. FRANK: At this time mark this State's Exhibit 2.

(The reporter then marked a City Hospital record anent James Drope, for identification as State's Exhibit 2.)

Q I show you that which is marked State's Exhibit 2. Can you identify that for the court?
A Yes, I can.
Q What is that, mam?
A A record on James Drope.
Q Is this part of the official records of City Hospital 1?
[171] A Yes, it is.
Q All right. When are these notes recorded there in this record?
MR. WATSON: Do you mind if I look at it, please?
MR. FRANK: May I have it for just a moment (handing exhibit to Mr. Watson).
MR. WATSON: This is a very lengthy document. Is there any particular portion you want to refer to?
THE COURT: Pardon me. You can handle it. Just get it identified and then offer it subject to your objection as to materiality, relevancy in any manner.
MR. WATSON: That is correct; I'll agree to that.
Q (Mr. Frank) All right. There are handwritten notes in this file. Are these handwritten notes made at the approximate time of treatment or viewing of the victim in this case, the defendant?
A Yes, they are.
Q Let me call your attention now—
THE COURT: I don't think Mr. Watson has any objection to them being hospital records?
MR. WATSON: I don't.
THE COURT: But he may ooject to any part you want to read as to materiality.
MR. WATSON: That is right, Your Honor.
Q (Mr. Frank) All right, Your Honor. I am now

referring to a page which is unnumbered as far as I can see.

[172] A May I see it? "25".

Q Is that "25"?

A (Nodding assent).

MR. FRANK: Your Honor, I am now referring to Admission Notes, 6-25-69, written in longhand by the doctor on duty at that time.

MR. WATSON: And, Your Honor, we will object to that at this time for the reason it is wholly immaterial and irrelevant in regard to this case and this motion, and is a record made by some other person, and it would be hearsay, Your Honor.

THE COURT: Well, pardon me. I can't pass on it. Is this a statement of the doctor or is this a statement of the defendant?

MR. FRANK: It is a statement that the defendant makes to the doctor.

THE COURT: All right. Be overruled.

Q (Mr. Frank) I call your attention to this section (pointing).

A (Reading) "This morning he shot himself with a .22 caliber at the alley and was brought in the emergency room. The cause of this was not definite, but he stated some problem—"

Q "Some problem with the law"?

A "—with the law."

MR. FRANK: All right. Your Honor, that statement of the defendant that he shot himself and had had some problems to do with the law, I ask to be admitted into evidence as a statement by the defendant to the doctor in charge at that time.

[173] MR. WATSON: If your Honor please, I am going to object to that for the reason it would be immaterial to any issue in this case. It is irrelevant, and, furthermore, if it were made, it was made while the man—from the information received or read by this young lady it was made quite a while after he had been shot. And there is no information here as to what condition he was in, whether he was, shall we say, coherent, and whether he knew what he was saying, if anything.

And it is merely a statement by a third party who is not present, Your Honor. I object to it for that reason and move that that answer be stricken.

THE COURT: Well, I think if the record shows that he is semi-conscious or rambling and not responsible for what he says, the objection should be sustained. Is there anything in that hospital record that shows that he was semi-conscious or rambling?

MR. FRANK: Your Honor, I can establish this man's state of mind with my next witness.

THE COURT: Not on that. Is there anything in there that shows that he was unconscious, having hallucinations or anything like that?

MR. FRANK: Your Honor, I call your attention to the following page which uses the word "conscious", showing the man is conscious, and there is a review of the general physical condition.

[174] THE COURT: Is that the entry note?

MR. FRANK: Yes, these are all the entry notes here.

THE COURT: Unless there is some showing that the doctor noted that he was rambling, incoherent.

MR. FRANK: The doctor shows that he is nervous, Your Honor, but shows that he is conscious.

MR. WATSON: Where do you see that?

MR. FRANK: "The man is nervous but conscious. X rays taken of the chest—."

THE COURT: All right. It will be overruled.

MR. WATSON: Well, I presume that word that the doctor wrote is "conscious" but it certainly doesn't look like it. Let's compare that with the one down here. Does it look like that?

MR. FRANK: It is the same.

MR. WATSON: I'll bring it out on cross-examination.

MR. FRANK: Now, I ask that that be admitted into evidence at this time as State's Exhibit 2.

THE COURT: Very well.

MR. FRANK: I have no further questions of this witness at this time.

CROSS-EXAMINATION

BY MR. WATSON:

Q What was your name, young lady? I am sorry, I don't recall it.

A Snowden.

Q Miss Snowden, directing your attention to the center of [175] this page, not numbered, but it is the same page as Mr. Frank was just talking to you about. I direct your attention to the center of that. Will you read for us please from the word "abdomen" on down?

MR. FRANK: What is the area?

MR. WATSON: I told her. Right there (pointing). She knows.

THE WITNESS: Yes.

MR. FRANK: Well, this area—just a minute. I want to make an objection. This area hasn't anything to do with the consciousness. It has to do with the abdomen and the actual location of the two bullets.

THE COURT: All right. You may read it.

THE WITNESS: I cannot make it out.

THE COURT: What is that under, "Abdomen"?

MR. WATSON: Yes, an abbreviation on the left side is abdomen—Abd.

THE COURT: I can't read it.

MR. WATSON: Well, the record offered by the State, honestly, I can't read it either. I want to know what—

THE COURT: How do you know it ought to be introduced then?

MR. WATSON: He has already introduced it. I want to know what he is introducing. I can't read it.

MR. FRANK: For the record, the only thing that the [176] State was introducing—

MR. FRANK: Pardon me. We know what you have introduced. Proceed.

Q (Mr. Watson) Let me call your attention to this word on the righthand side where it says "nervous". What does that say alongside of it? Can you interpret it?

A I feel it is an abbreviation of "consciousness".

Q An abbreviation for "consciousness"?

A Yes, sir.
Q It isn't written out like here (pointing)?
A And also feel—
Q This is "consciousness" too?
A Yes, and he stopped right there.
Q And he said according to this that he was nervous but was conscious. Is that your interpretation of it?
A Yes, sir.
MR. WATSON: I believe that is all, Your Honor.
THE COURT: All right. You may step down.
MR. WATSON: Oh, may I ask this witness one more question?
Q Miss Snowden, you were not subpoenaed to be here on the 25th day of June, were you, 1968—'69, rather?
A No.
Q This is the only time you have been subpoenaed?
A I don't remember. If I wasn't involved, someone else might have been.
[177] Q You have never been here before on this case?
A No, I haven't.
MR. WATSON: All right. That is all.

(Witness excused)

PATROLMAN JEROME DAMPIER, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Please state your name, sir?
A Patrolman Dampier.
Q What is your full name?
A Jerome.
Q Jerome. What is your business or occupation, for the record?
A Police Officer, St. Louis—City of St. Louis.
Q And what is your assignment or responsibility in the Department?
A Patrolman, District Five.
Q And how long have you been on the Force, sir?

A Two years.

Q On June 25th, 1969, were you working that day?

A Yes, sir.

Q On that Wednesday, sir, did you get any call around 8:00 in the morning, or 8:15 in the morning?

A Yes, sir.

Q What call, if any, did you get, sir?

A I got a call for attempted suicide.

MR. WATSON: Now, if Your Honor please, I am going to object to that. It would be hearsay.

MR. FRANK: For the record, this is an interdepartmental communication.

THE COURT: I don't think it makes so much difference. [178] I'll not take it for what it was but just the reason for his going there.

MR. WATSON: All right.

Q (Mr. Frank) Will you state again what your broadcast was, for the record?

A Attempted suicide.

Q All right. And did you get an address?

A Gave me an address on Bulwer, 5230, I believe.

Q All right. Did you go to this address at 5230 Bulwer?

A Yes, sir.

Q What is that address, Officer?

A It is a residence.

Q When you got to the residence, where did you park your vehicle?

A In front of the residence.

Q All right. And did you meet someone when you got there?

A As I got out of my vehicle I met a white female who identified herself as Frankie Dewey.

Q Did she tell you who she was?

A Yes, she said she was his mother.

Q What did she tell you, Officer?

MR. WATSON: I am going to object, Your Honor, again for the record; whatever statements were made outside the presence of the defendant are hearsay. I am going to object—

THE COURT: Well, it will not be binding on the defendant but anything she said could be used as attacking her credibility of her testimony and showing a contradictory statement.

[179] Q (Mr. Frank) Officer, will you tell the Court what she told you?

A She said he was supposed to go to court. He had been having trouble with his wife. He had shot himself and his brother had taken him to the hospital.

Q All right. And what did you do at that time, Officer?

A I checked with my dispatcher to ascertain if there was a victim of a shooting at any of the city hospitals, at which time he told me that there was one at City Hospital No. 1.

Q Officer, after that call did you check the premises?

A Yes, I did. I checked the garage.

Q Why did you go to the garage?

A Well, that is where the shooting is supposed to have taken place.

Q Who told you that?

A The mother.

Q That being Mrs. Dewey?

A Mrs. Dewey.

Q That the defendant shot himself in the garage?

A Yes, sir.

MR. WATSON: Your Honor, I assume my objection is going to all this line.

THE COURT: Yes.

Q (Mr. Frank) What did you find in the garage?

A I found a .22 caliber rifle lying on the ground inside the garage.

Q Officer, did Mrs. Dewey identify the rifle?

A She did. She identified it as belonging to her son, the one who had shot himself.

[180] Q Now, Officer, did you in fact go to the hospital?

A Yes, I did.

Q All right. At the hospital did you talk to—

THE COURT: Pardon me. I want the record to show that at this time any statements made by this woman is only admitted for the sole purpose of the credibility.

MR. FRANK: Credibility?

THE COURT: All right.

Q (Mr. Frank) At the hospital you also talked to a Homer K.? Is that correct?

A Yes, that's correct.

Q That is the brother of the defendant in this case?

A That's correct.

Q Did you take any statement from him?

A Yes. He told me that his brother shot himself in the stomach, and he brought him to the hospital.

Q All right. After talking to Homer K., did you in fact see James Drope, the defendant in this case?

A Yes, I did.

Q Where did you see him?

A When I saw him, he was laying on a stretcher out in the hall of the Emergency Room.

Q Can you tell the Court if you talked with him at that time?

A Yes, I did.

Q All right. Can you tell us whether or not he was conscious?

A Yes, he was conscious.

Q Can you tell us, was he able to talk with you?

[181] A Sure he was able to talk with me.

Q Can you describe his speech?

A It was clear.

Q Clear. Was it coherent?

A Yes, it was.

Q All right. Now, at that time when you talked with him, what did he tell you, Officer?

A He told me—

MR. WATSON: Now, if your Honor please, I must object to this for the reason that I understood his testimony is to be offered to attack the credibility of Mrs. Dewey.

THE COURT: Up to this time her statement, but that isn't the main purpose.

MR. WATSON: All right. You are going beyond that?

THE COURT: Yes.

MR. WATSON: O. K.

Q (Mr. Frank) Officer, at that time did the defendant make a statement to you?

A Yes, he did.

Q What did he say to you?

A He said he was supposed to go to court for rape, and he didn't do it; he rather be dead than to go to trial for something he didn't do. So he got his rifle out of his basement and went to the garage and shot himself.

Q Did he at any time when he was talking with you mention the word "blackout", that he couldn't remember how he was shot?

A No, sir, he didn't.

Q Officer, did you reduce this information to a police report?

A Yes.

[182] Q I show you that which is marked State's Exhibit 1. Will you look at that and identify that for the Court?

A Yes. This is the report I made, a copy of it anyway.

Q Does that report include all the statements taken from all the people in this case?

A Yes, it does.

Q Also includes the statement by the defendant in this case?

A Yes, it does.

Q In fact, it includes the statement you just made to the Court, is that correct?

A That's correct.

Q At any time during the time you were talking with Drope, did he lose consciousness?

A No, he didn't.

Q Did you determine his injury, the severity of his injury at that time?

A Before I talked to him I talked to the doctor to find out his condition, and the doctor said he wasn't

critical, upstairs he would be admitted and I could interview him, at which time I did.

Q You actually got permission from the doctor?

A From the doctor, yes.

Q Sometime that morning, Officer, did you talk to an officer of the Circuit Attorney's Office?

A Yes, I did.

Q And did you relate the police report to that officer of the Circuit Attorney's Office?

A Yes.

Q And, in fact, a copy of that report was forwarded to the office immediately, is that correct?

A This is correct.

[183] MR. FRANK: I have no further questions at this time.

CROSS-EXAMINATION

BY MR. WATSON:

Q Officer, what time was it when you conveyed this information to the office here in the Circuit Attorney's Office?

A Oh, it must have been around 9:00 o'clock, 9:15, around there, a little after.

Q About 9:00 or 9:15?

A About 9:00 or 9:15.

Q You conveyed all this information that is contained in this police report to the officer from the Circuit Attorney's Office; is that correct?

A This is correct. I made a call from the station.

Q Who was this man in the Circuit Attorney's office?

A Named Billings.

Q Mr. Billings. I see. Now, Officer, you say that would be about 9:00 or 9:15 on the morning of June 25th, 1969; is that right?

A Yes, sir, that is correct.

Q The same day this occurred?

A Yes, sir.

Q Now, when you say you interviewed Mrs. Dewey, and she said that her son shot himself, is that your testimony?

A Yes, sir.

Q Did she tell you, officer, that she saw him shoot himself?

A No, sir, she didn't.

Q She just said that he shot himself?

A Yes.

Q But didn't say that she had seen it?

A No, sir.

[184] Q Then you say you talked to his brother later at the City Hospital?

A Yes, sir.

Q And he also told you that his brother had shot himself?

A Yes, sir.

Q Did you ask him whether he had seen him shoot himself?

A No, sir, I didn't.

Q And did he ever intimate or say to you that he did see him shoot himself?

A No, sir.

Q He did not. Officer, when you had all this information at 9:00 o'clock on the morning of June 25th, 1969, were you requested by the Circuit Attorney's Office and State of Missouri to come into court and testify about this information in regard to this information you had received at that time by 9:15 that morning?

A Requested on the same date?

Q Yes, sir.

A No, sir.

Q You were not requested to come here at all?

A No, sir, not on the same date.

MR. WATSON: I believe that is all, Your Honor.

REDIRECT EXAMINATION

BY MR. FRANK:

Q Just one final question, Your Honor. Officer, isn't it a fact that your police report indicates that you per-

sonally talked to Officer Billings of our office, and at that time he requested a copy he immediately forwarded to his office?

A That is right.

Q That is actually in your police report?

A That is [185] indicated in the report.

MR. FRANK: No further questions.

RECROSS-EXAMINATION

BY MR. WATSON:

Q It is indicated in your report that you talked to Officer Billings at what time?

A I don't believe a time is indicated.

Q I believe you testified it was between 9:00 and 9:15?

A Yes; correct, between 9:00 and 9:15.

Q And when you gave that information to Officer Billings, he did not request you to come into this court and testify at that time?

A No.

MR. WATSON: That is all.

MR. FRANK: I have no further questions.

(Witness excused)

MR. FRANK: For the record, Your Honor, at this time the State is going to offer into evidence State's Exhibit 1, that being the official report made by this officer containing all statements, all admissions by the parties involved.

MR. WATSON: We are going to object to this, Your Honor please.

THE COURT: Very well, it will be overruled.

MR. FRANK: The state has no further evidence.

MR. WATSON: I have. Well, just a minute, please, Your Honor.

DEFENDANT'S CASE IN REBUTTAL.

[186] JAMES EDWARD DROPE, the defendant herein, having been previously sworn and examined, testified further in rebuttal:

DIRECT EXAMINATION

BY MR. WATSON:

MR. FRANK: Just a minute. I would like to know the purpose of this.

THE COURT: You will find out by the questions asked.

Q (Mr. Watson) Mr. Drope, you heard this police officer testify, Officer Dampier, did you not?

A Yes, sir.

Q That you had made a certain statement to him? Did you make such a statement to him?

THE COURT: Oh, pardon me. He has already denied that. He denied that on cross.

A I never seen him before.

THE COURT: He said he did not tell the officer that he shot himself. "I don't remember talking to anyone about anything at the hospital."

MR. WATSON: That's right.

THE COURT: All right.

MR. WATSON: That is all.

(Witness excused)

THE COURT: All right. Is there anything further you want to say with reference to the motion for a new trial or do you intend to submit a memorandum?

MR. WATSON: Your Honor, I would submit a memorandum [187] with regard to the law in it.

THE COURT: This is on the motion for a new trial?

MR. WATSON: That's right, Your Honor.

THE COURT: How many days do you want to submit it?

MR. WATSON: Well, I am leaving for Switzerland next Thursday with the Bar Association. So it would have to be before then.

THE COURT: All right. Will you give the Clerk a memorandum, Mr. Watson and Mr. Frank,—

MR. WATSON: I'll do that, Judge.

THE COURT: —motion for new trial heard and to be taken as submitted on the filing of the last brief. Defendant allowed ten days and the State allowed five.

MOTION FOR NEW TRIAL OVERRULED.

Thereafter, on October 15, 1969, the defendant's motion for a new trial having been heard and submitted and considered by the Court was by the Court overruled. The Court filed in said cause the following memorandum in connection therewith:

"MEMORANDUM AND RULING ON DEFENDANT'S MOTION FOR A NEW TRIAL"

(Caption and formal parts omitted)

"The only point made in defendant's memorandum in support of his motion for a new trial is the failure of the record to show 'any reasons for defendant's absence during a portion of the trial'.

[188] "The defendant was on hand and present during the first and second day of trial and when the court adjourned to June 25th, 1969, for further proceedings. The defendant failed to appear on June 25th, and the court after an hour's wait proceeded with the trial. The information the court received over the phone and which was checked by the Circuit Attorney's Office through the Police Department with the hospital may not appear in the trial proceedings, but it seems ridiculous to urge that the State or the Court should be required to prove that the defendant's absence was voluntary. Neither the State nor the Court should be required to play hide-and-seek with the defendant. Common sense dictates that the burden is on the defendant to show his absence was

not voluntary; any other rule places the control of the progress of the case in the hands of the defendant and could well lead to bizarre situations and disrespect for the Court.

"However, the whole matter *is* in the record. The defendant was the movant in making a record of the cause of his absence at the hearing on the motion for a new trial. The Court finds from the evidence that the absence of the defendant was due to his own voluntary act in shooting himself; done for the very purpose of avoiding trial. In this type of case where the victim suffers an ordeal in testifying, it is all the more necessary for the Court to carefully scrutinize the defendant's conduct in causing his absence from the trial of the case. The [189] victim in this case faced the prospect of testifying to the revolting conduct of four more persons charged with rape as a result of this occurrence.

"The Court has reviewed the instructions and the testimony and finds no error in the trial or any reason why the motion for a new trial should be sustained.

"THEREFORE, it is ordered and adjudged that the motion for a new trial, having been heard and submitted and considered by the Court, is hereby overruled, and sentencing is set for Tuesday, October 21st, at 9:15 A.M."

/s/ "Daivd A. McMullan
Judge—Div. #19.

Filed October 15, 1969.

ALLOCUTION AND SENTENCE

Thereafter, on October 21st, 1969, the defendant, James Edward Drope appeared in open court in person and with his attorney, Mr. Jack E. Koslow (of the law office of Mr. Lester Watson). Mr. Michael Frank, Assistant Circuit Attorney, appeared for the State of Missouri. Thereupon, the following proceedings were had in said cause:

MR. KOSLOW: I am appearing for Mr. Lester Watson who is the attorney of record, who is out of the country.

THE COURT: This is the case of James Edward Drope, Cause No. 405-R. Have you given the reporter your full name?

MR. KOSLOW: Yes, I have, Your Honor.

[190] THE COURT: And you represent Mr. Drope?

MR. KOSLOW: Yes, I am here this morning standing in for Mr. Watson.

THE COURT: All right. Will you stand, James Edward Drope. In Cause No. 405-R, on June 25th, 1969, a verdict of guilty was rendered against you by the jury after a trial, finding you guilty of rape. And the Court assessed the penalty on July 21st at life. The motion for a new trial has been overruled. And do you now have any legal cause to show why judgment should not be pronounced against you.

(Discussion between Mr. Drope and Mr. Koslow, out of the hearing of the reporter)

MR. DROPE: (the defendant): I can't find no legal reason at this point.

THE COURT: All right. The answer then is no?

MR. DROPE: What I said, Your Honor.

THE COURT: And do you have any legal cause to show why judgment should not be pronounced against him?

MR. KOSLOW: No legal cause at this time.

THE COURT: All right. In view of the verdict of guilty brought in by the jury and the punishment imposed by the Court, and the motion for a new trial having been overruled, you will be sentenced to the Department of Corrections for the balance of your natural life.

[191] JUDGMENT OF CONVICTION.

RECORD ENTRY—Tuesday, October 21, 1969.

(Caption and formal parts omitted)

"Now, on this day, comes the Assistant Circuit Attorney for the State, and also comes the defendant herein, in person, in the custody of the Sheriff of this City, and in the presence of Lester Watson, by Jack Koslow, Attorney and Counsel, in open Court. Whereupon, the Court orders the Official Court Reporter to take notes to preserve the evidence.

"Whereupon, said defendant is informed by the Court that he has heretofore been found guilty on June 25, 1969, by a Jury of the offense of Rape and the penalty fixed by the Court at imprisonment in the State Department of Corrections for the remainder of his natural life; and being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court that the said defendant, JAMES EDWARD DROPE, having been found guilty by a Jury as aforesaid under an Indictment against him, be committed to the State department of Corrections for the Remainder of his Natural Life, there to be kept and committed until the judgment and sentence of this Court herein be complied with or until the said defendant shall be otherwise discharged by due course of law.

"It is further considered, ordered and adjudged by the [192] Court, that the State have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefor."

* * * *

[196]

* * * *

"NOTICE OF APPEAL"

"Notice is hereby given that the above-named defendant, James Edward Drope, hereby appeals to the Supreme Court of Missouri, from a final order entered in the above proceedings, 'denying defendant's motion for a new trial, which was denied October 21, 1969, upon which conviction he was assessed a term of imprisonment for the remainder of his natural life.'"

/s/ "James E. Drope, Defendant—pro se."

Filed March 12, 1970, by leave granted by the Mo. Supreme Court.

* * * *

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO

[Reported at 462 S.W.2d 677, Filed January 11, 1971]

No. 55 489

STATE OF MISSOURI, RESPONDENT

v.

JAMES EDWARD DROPE, APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

The Honorable David A. McMullen, Judge

STOCKARD, *Commissioner*:

Charged as a second offender, defendant was found guilty by a jury of rape. The court assessed the punishment at life imprisonment.

The evidence presented by the State permitted a finding by the jury that on January 17, 1969, defendant and four other men, cooperating together, tied defendant's wife to a bed, and while defendant held a gun at her head, each had sexual intercourse with her against her will and with force and violence to her person.

Defendant first contends that his motion for a verdict of acquittal should have been sustained because "the State failed to produce sufficient evidence to sustain the indictment in that defendant was not charged with aiding and abetting others in the commission of the crime of rape, and he himself, could not be charged with raping his own wife."

The statutory definition of rape, § 559.260, RSMo 1969, V.A.M.S., does not by express language exclude the accused's wife as a person upon whom the crime may be committed. However, for the purposes of this opinion we shall assume that the statute incorporates the common law rule that a husband cannot be guilty of rape

based upon his forceful intercourse against the will of his wife. See 84 A.L.R.2d at p. 1019.

Defendant was charged as a principal in that he and others "did unlawfully and feloniously make an assault" upon his wife and "did then and there unlawfully, feloniously and forcibly rape, ravish and carnally know [her] against her will." It is provided in § 556.170, RSMo 1969, V.A.M.S., that a principal in the second degree in the commission of any felony "may be charged, tried, convicted and punished in the same manner, as the principal in the first degree." One who is present at the place of the crime and aids and abets the prepetrator thereof is a principal in the second degree. 22 C.J.S. Criminal Law § 85; 21 Am. Jur.2d Criminal Law, § 121. As such, he may be charged and tried as a principal in the first degree, § 556.170, supra; State v. Murray, Mo., 445 S.W.2d 296, 298; State v. Sheard, Mo., 276 S.W.2d 191, without setting out in the charge the facts by which he aided and abetted, 42 C.J.S. Indictments and Informations § 147, and without alleging a conspiracy. State v. Reed, Mo., 453 S.W.2d 946. The charge of defendant as a principal was authorized.

Defendant argues, however, that to charge him as a principal results in uncertainty as to the charged offense, and that one reading the statute pertaining to rape would not know that the conduct of defendant relied on by the State would constitute a violation of that statute. This implies a reliance on § 18(a), Art. I, Constitution of Missouri wherein it is provided that an accused has the right "to demand the nature and cause of the accusation." In State v. Spica, Mo., 389 S.W.2d 35, a similar contention was made when the defendant, being an accessory before the fact, was charged as a principal pursuant to § 556.170, supra. It was held that such a charge does not infringe the above constitutional provision. The same is true when the basis for the charge as a principal pursuant to the statute was conduct which resulted in the accused being a principal in the second degree.

Defendant argues that in no event could he be found guilty of rape of his wife, even though the basis of the

charge was that he aided and abetted another in the commission of the offense. One not the husband of the victim can be found guilty of rape on the basis of aiding and abetting even though he does not engage in the act of sexual intercourse. State v. Sheard, supra. No Missouri case is cited to us, and we have found none, holding that as an aider and abettor a husband may be found guilty of the rape of his wife. However, the issue has been ruled in other states.

In an annotation entitled "Criminal responsibility of one cooperating in offense which he is incapable of committing personally," 131 A.L.R. 1322, rape cases are annotated in which the conviction of the husband of rape for aiding and betting another was held proper. In another annotation at 84 A.L.R.2d 1017, entitled "Criminal responsibility of husband for rape, or assault to commit rape, on wife," the general rule is stated the "While a husband may, without criminal liability for rape, enforce sexual connection for himself upon his wife despite her actual denial of his right, he may not enforce sexual intercourse upon her through the instrumentality of another man." Cases are then cited in which it is held that a husband who does so may be charged and found guilty of the crime of rape. Cases so holding include the following: People v. Chapman, 62 Mich. 280, 28 N.W. 896, 4 Am. St. Rep. 857; In re Kantrowitz, 24 Cal. App. 203, 140 Pac. 1078; Kitchen v. State, 101 Tex. Crim. 439, 276 S.W. 252; Bohanon v. State, Okla. Cir., 289 P.2d 400; Cody v. State, Okla. Cir., 361 P.2d 307; 84 A.L.R.2d 997; Elliott v. State, 190 Ga. 803, 10 S.E.2d 843; State v. Boyland, 24 Kan. 186; State v. Olsen, 138 Or. 666, 7 P.2d 792 (dicta); People v. Damen, 28 Ill. 2d 464, 193 N.E.2d25; State v. Digman, 121 W. Va. App. 499, 5 S.E.2d 113; State v. Blackwell, Or., 407 P.2d 617. We have not found any case disapproving the above general rule.

We conclude that defendant was properly charged, and that under the facts of this case he was properly found guilty of rape even though the victim was his wife.

Defendant next contends that the "verdict was against the weight of the evidence." Our brief statement of facts,

and the ruling on defendant's first point, demonstrates that a submissible case was made. The determination of the credibility of the witnesses is for the jury, and an appellate court does not weigh the evidence. State v. Dowe, Mo., 432 S.W.2d 272. This point presents no issue for appellate review.

Defendant's third and fifth points are that the court erred in proceeding with the trial when he was absent, and that there was "no evidence upon the record" that he voluntarily absented himself from the trial.

The trial started on June 23, 1969. On June 29 [sic] after the testimony of four witnesses had been taken, the court recessed the proceedings. Defendant was free on bond, and the following morning he did not appear in court. The record shows that the court stated to the jury that "We were delayed through no fault of either the Court or the attorneys," and that defendant's counsel then moved for a mis-trial "in view of the fact that the defendant * * * shot himself this morning." The court then stated that it had "already decided that the matter would proceed for trial," thereby implying that the matter had previously been discussed, apparently in chambers or at least off the record. When defense counsel stated that it would be difficult "to go to trial without a client," the court stated: "That is the difficulty * * * that your client brought about, not you, not the court. He was on bond and his responsibility [is] to be here. So the Court will proceed with the case." Four additional witnesses were then heard. In addition, the hearing was held to prove the prior conviction. During this testimony in the absence of defendant, his counsel was present and participated in the trial by entering objections and by cross-examination.

In defendant's motion for new trial, error was assigned in proceeding with the trial while he was absent. A hearing was held in which defendant testified that on the morning of June 25 he had gone to his brother's house to change clothes, and that he remembered nothing concerning the circumstances of being shot except that he felt a burning pain in his stomach and later woke up in the hospital. He denied making any statements that

he had shot himself to avoid attending trial. The police officer who investigated the matter testified that at the hospital he talked to defendant who told him, in the words of the officer, that "he was supposed to go to court for rape, and he didn't do it; he [would] rather be dead than go to trial for something he didn't do. So he got his rifle out of his basement and went to the garage and shot himself." In ruling on the motion for new trial, the court found that defendant intentionally shot himself to avoid attending the trial.

We disagree with defendant's contention that there is "no evidence upon the record" that he voluntarily absented himself. The court made such a determination before proceeding with the trial, although the basis for that determination is not fully disclosed. However, when defendant is free on bond, and he does not appear at the appointed time, it is presumed that the absence is voluntary until established otherwise. People v. Steenbergen, 31 Ill.2d 615, 203 N.E.2d 404, certiorari denied 382 U.S. 853, 86 S.Ct. 104, 15 L.Ed.2d 92; State v. Cumbo, 96 Ariz. 385, 396 P.2d 11; Cox v. Hand, 185 Kan. 780, 347 P.2d 265, certiorari denied 363 U.S. 822, 80 S.Ct. 1265, 4 L.Ed.2d 1520. In any event, the circumstances were presented in full at the hearing on the motion for new trial, and the trial court affirmatively found that defendant did voluntarily absent himself. We find no reason to disagree with the evaluation by the trial court of the testimony on this issue, and we give due deference to its findings and conclusion. We shall, therefore, rule this issue on the basis that, as the trial court found, defendant voluntarily and intentionally inflicted a wound on himself with the intent to make his presence at the trial impossible.

Art. I, 18(a), Constitution of Missouri, V.A.M.S., provides that "the accused shall have the right to appear and defend, in person and by counsel," and Supreme Court Rule 29.02, V.A.M.R., provides that no person shall be tried upon an indictment or information for a felony unless he be personally present during the trial. However, Supreme Court Rule 29.03 states that in all cases

the verdict of the jury may be received by the court and entered upon the record in the absence of th defendant, when such absence is willful or voluntary on the part of defendant. See also § 546.030, RSMo 1969, V.A.M.S. As to the constitutionality of the provisions of Rule 29.03, see State v. Hope, 100 Mo. 347, 13 S.W. 490, 8 L.R.A. 608.

In this case the defendant was absent at the time the verdict of the jury was received, but such action by the court in receiving the verdict is expressly authorized, under the factual circumstances of this case, by Supreme Court Rule 79.03, and by analogy defendant's contention is ruled by State v. McCrary, 365 Mo. 799, 287 S.W.2d 785. In that case the defendant voluntarily absented himself from the courtroom when the trial judge declared a mistrial and discharged the jury on the basis that it could not reach a verdict. See also the cases cited in the annotation entitled, "Absence of accused at return of verdict in felony cases," 23 A.L.R.2d 456, and particularly the cases cited in § 10 of the annotation. p. 478 et seq., pertaining to the waiver of the right to be present when the defendant voluntarily absents himself. We find no merit to the contention that prejudicial error resulted when the trial court received the verdict of the jury when defendant was absent.

In this case, however, defendant was also absent during a portion of the trial when witnesses for the State testified in support of the charge against him, and also when evidence was heard on an essential phase of the trial; the proof of the previous conviction to envoke the second offender act. See State v. Colbert, Mo., 344 S.W.2d 115. The essential questions are whether Supreme Court Rule 29.02 permits a waiver by defendant of his right to be present at those phases of his trial, and also whether by voluntarily absenting himself, a defendant can waive his constitutional right to be present.

In State v. Smith, 90 Mo. 37, 1 S.W. 753 (reported in the latter citation under a different name), 59 Am. Rep. 4, the defendant was absent during the entire voir dire examination of the jury and also at some preceding stakes of the trial. The circumstances which brought about the

absence was not shown, but it was ruled that the public had an interest in the trial of criminal cases, and that even if the defendant's absence be considered voluntary, there could be no waiver. It was stated that the expression of the one exception in the statute (now § 546.030 and contained in Rule 29.03), permitting the court to receive a verdict during a voluntary or willful absence of the defendant, excluded all authority to take other steps in defendant's absence. However, in State v. Brewer, 109 Mo. 648, 19 S.W. 96, it was said that the Smith case "went to the extreme," and in State v. Hope, supra, in discussing the provision now in Rule 29.03 authorizing a verdict to be received in the absence of the defendant, the court indicated that the provision was a recognition and expression of the common law waiver by defendant of a right which he had, that is, to be present at all phases of his trial. In other cases it has been held that brief absences of a defendant during the taking of evidence or during argument did not constitute prejudicial error. See State v. Gonce, 87 Mo. 627; State v. Bell, 70 Mo. 633; State v. Grate, 68 Mo. 22; and the annotation at 100 A.L.R. 480. However, the rulings seem to have been based, at least in part, on a finding that prejudice did not result, and such was the conclusion in State v. Murphy, 292 Mo. 275, 237 S.W. 529, even though it was also said that his presence "could not be waived" by defendant. In State v. McCrary, supra, defendant was absent voluntarily when the court declared a mistrial, which is not within the exception set forth in Rule 29.03. This court reviewed in detail the history of the statutory provisions as now contained in § 546.030, and restated in the above cited rules, and said this: "We think that the present wording of our statute, § 546.030, [and Rule 29.03] permitting the reception of a verdict during the voluntary or willful absence of the defendant is declaratory of a policy that such *rights* may be waived. We do not agree with the statements in State v. Smith, supra, that the expression of that exception necessarily excludes all other exceptions, and that in no other instance may the actual presence of defendant be waived. * * * We do not believe that

the legislature meant to say that the defendant must, in all events, be present at every other stage of the trial." The court then continued as follows: "But to hold that a defendant, who is at liberty during the trial, must in all events be present at every material step, is to place in his hands the power completely to nullify the trial. If he should absent himself and remain away the court would simply have to suspend all proceedings, and eventually discharge the jury and declare a mistrial. * * * Such a result is to us unthinkable. It is the duty of such a defendant 'to wait upon the court,' and to be present at all times when he may anticipate that proceedings might take place; * * *." These views expressed in the McCrary case were reaffirmed in State v. Colbert, supra, a case in which the defendant was absent at a phase of the trial other than the receipt of the verdict, and it was further stated: "The administration of justice will not best be promoted by requiring a rigid and unyielding conformance to Rule 29.02 (first clause of § 546.030), in all cases and regardless of the circumstances. Inevitably exceptional cases calling for amelioration will arise. In justice it must be held that under the particular circumstances under review appellant failed to exercise and therefore waived his right and privilege to be present." In both of these cases the absence of the defendant was the result of inattention or negligence. In the case under consideration, however, the absence of the defendant resulted from an intentional act by him done for the express purpose of preventing his presence at the trial, and we conclude such act constituted a waiver of defendant to his right to be present.

This conclusion is in accord with the general rule as applied in other states and by the federal courts.

In the recent case of State of Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353, the United States Supreme Court stated that the Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *," and that the guarantees of this clause is obligatory upon the States.

However, it was then held that an accused cannot claim the benefit of this "most basic" right while at the same time engage in disruptive conduct that makes it exceedingly difficult or impossible to carry on the trial. In the opinion in the Allen case, Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500, was cited with approval for the proposition that the court had "expressly rejected" the contention that a trial can never continue in defendant's absence. In addition, the court quoted with approval from Snyder v. State of Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, that " 'the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct.' " In the Diaz case, the Supreme Court quoted from Falk v. United States, 15 D.C. App. 446, 454, appeal dismissed, 180 U.S. 636, 21 St.Ct. 922, 45 L.Ed. 709, a case where the accused appeared for trial but fled the judisdiction before the trial was completed, as follows:

> " 'It does not seem to us to be consonant with the dictates of common sense that an accused person . . . should be at liberty, whenever he pleases, . . . to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it . . . This would be a travesty of justice which could not be tolerated. . . . [W]e do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration of justice as to the true interests of civil liberty. . . .
>
> " 'The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into solemn farce, and untimately [sic] compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will

the law allow a person to take advantage of his own wrong.' "

For a few of the cases from other jurisdictions following the rule here advanced, see State of Arizona v. Hunt, 6 Cir., 408 F.2d 1086; Cureton v. United States, D.C. Cir., 396 F.2d 671; State v. Taylor, 104 Ariz. 264, 451 P.2d 312; State v. Cumbo, supra; People v. Steenbergen, supra; State v. Chuning, 201 Kan. 784, 443 P.2d 248, certiorari denied 393 U.S. 1069, 89 S.Ct. 726, 21 L.Ed.2d 712; State v. Way, 76 Kan. 928, 93 Pac. 159, 14 L.R.A., N.S., 603; Cox v. Hand, supra.

We note that this is a capital case, that the record does not show a waiver of the death penalty, but that capital punishment was not imposed. Some authorities seem to distinguish between a waiver of the right to be present in capital cases and in felony cases generally. See the annotation at 23 A.L.R.2d 491; 23 C.J.S. Criminal Law § 975; and 21 Am. Jur.2d, Criminal Law § 286. Federal Rule 43 for criminal procedure in the federal courts, expressly excludes waiver of the right to be present in capital cases. However, we agree with the previous statement of this court in State v. McNary, supra, and with the ruling in Boreing v. Beard, 226 Ky. 47, 10 S.W.2d 447, that there is no logical basis for the distinction, absent a statute or rule on the matter. The State is interested in all felony prosecutions, and it is as much the duty of the courts in the prosecution of felony cases generally to protect the liberty of accused persons as it is their duty to protect the rights of one accused of a capital offense. As noted in the McCrary case, the legislature, in amending the statute, now § 546.030, in 1879 to authorize the entry of a verdict when the defendant voluntarily absented himself, made no distinction between capital cases and other felony cases, and we consider that a declaration of the public policy of this State.

Defendant next assigns as error the refusal of the trial court to grant a continuance "to procure additional psychiatric evaluation."

It appears from the record that an improper, or insufficient, motion for a psychiatric examination was filed

in the assignment division of the circuit court along with a request for a continuance to September 1969. The request for the continuance to September was overruled, but the case was continued to June 23. Based on a colloquy between the trial court and defense counsel at the time of trial, it appears that the assignment judge advised defense counsel that if he seriously contended that defendant needed psychiatric help he should file a proper motion, but it was never filed. On June 23, after the jury panel had been sworn on voir dire, and by implication after a discussion had been held off the record concerning the matter, defense counsel requested a continuance to September. According to the statement made by counsel to the trial court, the defendant had previously been examined by a psychiatrist who had recommended further examination, evaluation and psychiatric treatment. This report of the psychiatrist is not in the record. Whether it was called to the attention of the assignment judge does not appear. The trial judge commented on what had transpired, and stated, "let the record show they [presumably defense counsel] went back to [the assignment judge], and after being in there fifteen or twenty minutes, [he] has refused to grant a continuance." The trial court directed that they proceed, and stated that "before the jury is sworn in, I am going to ask [the assignment judge] to review this statement." There is no further ruling by the trial court on this matter prior to the time the jury was sworn in, and it is therefore presumed that the trial court's conference with the assignment judge resulted in its determination to proceed with the trial.

In the argument in his brief defendant seems to base his contention that error resulted in denying the request for a continuance on the basis that additional psychiatric care would take substantial time, and that the time was needed to prepare for trial. There is no contention in the brief that defendant did not have the mental capacity to proceed with the trial.

The granting of a continuance rests largely within the discretion of the trial court, State v. Boykins, Mo., 399 S.W.2d 70, and an appellate court should interfere with

the trial court's action only where a clear abuse of discretion is shown. State v. Thomas, Mo., 433 S.W.2d 537. The record does not demonstrate an abuse of discretion.

The final contention is that the punishment assessed is cruel and inhuman.

This court has repeatedly held that a sentence within the limits fixed by the legislature is not, without something else being shown, to be considered to be in violation of the constitutional limitation prohibiting cruel and unusual punishment. State v. Brownridge, Mo., 353 S.W. 2d 715; State v. Cook, Mo., 440 S.W.2d 461. See also the annotation at 33 A.L.R.2d 335, 368-369 of cases holding that the length of sentences alone, within the legislative prescribed limits, do not result in a violation of constitutional provision prohibiting cruel and unusual punishment. It cannot be said that the facts of this case, when considered by the trial court in assessing the punishment, could not reasonably call for the severe punishment imposed. In the absence of circumstances other than the severity of the punishment, we are constrained to rule that the punishment does not exceed constitutional limitations.

The judgment is affirmed.

ALDEN A. STOCKARD
Commissioner.

Barrett, C., Concurs.
Pritchard, C., Concurs.

PER CURIAM: The foregoing opinion by Stockard C., is adopted as the opinion of the Court.

All of the Judges Concur.

IN THE SUPREME COURT OF MISSOURI

NOVEMBER SESSION, 1970

Circuit Court No. 405-R

No. 55,489

[Filed Feb. 25, 1971. James H. McAteer, Clerk, Circuit Court for Criminal Causes]

JUDGMENT

STATE OF MISSOURI, RESPONDENT

vs.

JAMES EDWARD DROPE, APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed; and that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution. It is further considered and adjudged by the Court that the sentence pronounced against the said James Edward Drope, appellant herein, by the said Circuit Court of the City of St. Louis be executed, and that the marshal of this court arrest the said James Edward Drope without delay, wherever he may be found in this State, and deliver him to the Department of Corrections, Jefferson City, Missouri, to be confined in the appropriate penal institution for and during the period of his natural life, the same being the sentence passed by the said Circuit Court of the City of St. Louis. (Opinion filed.)

STATE OF MISSOURI—Sct.

I, MARION SPICER, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the November Session thereof, 1970, and on the 11th day of January 1971, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 11th day of January 1971.

/s/ Marion Spicer
MARION SPICER
Clerk

POSTCONVICTION PROCEEDINGS

[3]

IN THE CIRCUIT COURT OF THE
CITY OF ST. LOUIS

STATE OF MISSOURI

DIVISION 19

PERSONS IN CUSTODY

Case No. PCR 294

JAMES EDWARD DROPE
Prison Number 17695

VS.

STATE OF MISSOURI, RESPONDENT

* * * *

[4]

* * * *

MOTION TO VACATE JUDGMENT AND SENTENCE UNDER SUPREME COURT RULE 27.26

MOTION

1. Place of detention MISSOURI STATE PENITENTIARY—JEFFERSON CITY, MO.
2. Name and location of court which imposed sentence CIRCUIT COURT OF THE CITY OF SAINT LOUIS—ST. LOUIS, MISSOURI DIV. 19.
3. The case number and the offenses for which sentence was imposed: NO. C-13219 FORCIBLE RAPE & PRIOR CONVICTION OF A FELONY CAUSE NO. 405-R.

4. The date upon which sentence was imposed and the terms of the sentence: OCTOBER 21ST, 1969—NATURAL LIFE [5] IMPRISONMENT.
5. Check whether a finding of guilty was made:

   (a) After a plea of guilty _____
   (b) After a plea of not guilty YES.

6. Did you appeal from the judgment of conviction? YES.
7. If you answered "yes" to (6), list

   (a) the name of the court to which you appealed:

   SUPREME COURT OF MISSOURI
   UNITED STATES DISTRICT COURT—EASTERN DISTRICT OF MISSOURI, ST. LOUIS, MISSOURI.

   (b) the result in such court and the date of such result:

   MISSOURI SUPREME COURT AFFIRMED CONVICTION DISMISSED W/O PREJUDICE FOR FAILURE TO EXHAUST AVAILABLE STATE REMEDY (SEE DEFENDANT'S EX. A)

8. State concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence.

   (a) MOVANT'S RIGHTS UNDER THE PROVISIONS OF CHAPTER 552.020. 552.020 SUBD. 2. V.A.M.S. WERE VIOLATED BY THIS COURT.
   (b) MOVANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

9. State concisely and in the same order the facts which [6] support each of the grounds set out in

(8), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts:

(a) SEE SUPPLEMENTAL BRIEF ATTACHED HERETO.
(b) SEE SUPPLEMENTAL BRIEF ATTACHED HERETO.
(c) SEE SUPPLEMENTAL BRIEF ATTACHED HERETO.

10. Prior to this motion have you filed with respect to this conviction:

(a) Any motion to vacate judgment under Missouri Supreme Court Rule 27.26? NO
(b) Any petitions in state or federal courts for habeas corpus? YES
(c) Any petitions in the United States Supreme Court for certioran? NO
(d) Any other petitions, motions or applications in this or any other court? YES

11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application.

(a) the specific nature thereof:

(b) the name and location of the court in which each was filed:

i UNITED STATES DISTRICT COURT—EASTERN DISTRICT—ST. LOUIS, MISSOURI
ii _____
iii ALSO APPEAL TO SUPREME COURT OF MISSOURI

[7] (c) the disposition thereof and the date of such disposition:

i DISMISSED W/O PREJUDICE FOR FAILURE TO EXHAUST AVAILABLE STATE REMEDY.
ii _____

iii CONVICTION AFFIRMED BY MISSOURI SUPREME COURT.

(d) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i UNITED STATES DISTRICT COURT ORDER ATTACHED HERETO AND MARKED EXHIBIT A.

12. Has any ground set forth in (8) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? NO

13. If you answered "yes" to (12) identify:

(a) which grounds have been previously presented:

i MOVANT'S RIGHTS VIOLATION UNDER CHAPTER 552

(b) the proceedings in which each ground was raised:

i FEDERAL HABEAS CORPUS—NOT RULED UPON BECAUSE FEDERAL COURT LACKED JURISDICTION.

14. If you have filed prior proceedings in any state or federal court involving this same sentence but did not raise therein one or more of the grounds you now list in (8), state which were not raised in the earlier proceedings and why they were not raised in those [8] proceedings:

(a) MOVANT'S RIGHTS VIOLATION UNDER CHAPTER 552

(b) INEFFECTIVE ASSISTANCE OF COUNSEL —SELF EXPLANATORY.

15. Were you represented by an attorney at any time during the course of:

(a) your preliminary hearing; YES
(b) your arraignment and plea? YES
(c) your trial, if any? YES
(d) your sentencing? YES

(e) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(f) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

16. If you answered "yes" to one or more parts of (15), list

(a) the name and address of each attorney who represented you:

i NAME UNKNOWN (PRELIMINARY HEARING)
ii LESTER WATSON—RICHMOND HEIGHTS, MO.

(b) the proceedings at which such attorney represented you

i PRELIMINARY HEARING
ii ALL OTHER PROCEEDINGS EXCEPT FEDERAL HABEAS CORPUS

(c) was said attorney

i appointed by the court? _____
[9] ii of your own choosing? YES

17. Are you now under sentence from any other court that you have not challenged? NO

18. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? YES

/s/ JAMES E. DROPE
Signature of Petitioner

STATE OF MISSOURI)
) SS
COUNTY OF COLE)

I, JAMES EDWARD DROPE being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that the matters and allegations therein set forth are true.

/s/ JAMES E. DROPE
Signature of Affiant

Subscribed and sworn to before me this —— day of ——————————, 19 ——.

/s/ JOSEPH T. TEIN
Notary Public

FORMA PAUPERIS AFFIDAVIT

I, JAMES EDWARD DROPE, DO STATE THAT I AM WITHOUT FUNDS OR SECURITIES AND AM UNABLE TO PAY THE COSTS INCURRED IN [10] THIS MOTION TO VACATE JUDGMENT AND SENTENCE, AND AM UNABLE TO GIVE SECURITY THEREFOR, AND THAT I BELIEVE I HAVE A MERITORIOUS CAUSE OF ACTION.

/s/ JAMES E. DROPE
Signature of Petitioner

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

I, JAMES EDWARD DROPE being first duly sworn upon my oath, depose and say that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

/s/ JAMES E. DROPE
Signature of Affiant

Subscribed and sworn to before me this —— day of _____, 19 ——.

/s/ JOSEPH T. TEIN
Notary Public

* * * *

[30] * * * *

PROCEEDINGS

MR. WEISS: (Appointed Counsel for Movant) Your Honor, as our first witness we would like to call Dr. Joseph Shuman to the stand.

JOSEPH S. SHUMAN, of lawful age, a witness called by the movant, having been first duly sworn, was examined and testified as follows:

MR. WILLIAMS: Your Honor, the state would request that any other witnesses other than the defendant who are going to testify be excluded from the court.

THE COURT: All right. We have the rule of exclusion. All witnesses who are going to testify in the case will have to leave the courtroom.

DIRECT EXAMINATION

BY MR. WEISS:

Q Doctor, for the record, you have stated your name to the reporter as Dr. Joseph Shuman: is that correct?

A Yes, sir.

Q Where do you reside?

A I live in St. Louis County.

Q Do you have an office there?

A Yes.

[31] Q What is your profession, Doctor?

A I practice medicine, specializing in psychiatry.

Q You specialize in psychiatry?

A Yes.

Q How long have you been in the practice of psychiatry?

A Since 1952—'53. I'm sorry.

Q During all that time, have you practiced here in St. Louis?

A Yes.

Q What kind of educational background do you have, Doctor?

A I have a B.S. degree from college, M.D. from medical school. Following that a year of internship and three

years of residence in psychiatry. I am a diplomat of the American Board of Psychiatry and Neurology.

Q Doctor, at any time, if you can recall, did you examine James Edward Drope, the defendant sitting here at counsel table?

A Yes. I examined him on February 20, 1969.

Q Okay. How long a period did you get to talk to him or examine him?

A About an hour and a half.

Q Was that in your office, Doctor?

A Yes.

Q Doctor, did you subsequently make a written report of that examination?

A Yes, I did.

Q Did that report include your impressions that you obtained from that examination?

A Yes, it did.

Q Doctor, I'm going to hand you a document here and I want you to tell me whether or not that is a correct and true [32] copy of the report that you have just testified you made as a result of that examination of James Edward Drope?

A Yes. It appears to be similar to my copy. Exactly alike.

MR. WEISS: Could we have this marked as movant's exhibit B?

THE COURT: Is that the same?

MR. WEISS: It is in the record, Your Honor.

THE COURT: The record may reflect that a xerox copy of his report is in the file and apparently was filed at the same time there was a motion for a continuance on, it looks like, May the 27th, '69. Is that agreeable to counsel?

MR. WEISS: I think there was a motion filed.

THE COURT: A motion for a continuance.

MR. WEISS: A motion to continue this case in order that he might receive an examination, evaluation and the psychiatric treatment as suggested.

THE COURT: That was the grounds for the motion. I want the dates here. Is this right, May the 27th?

MR. WEISS: Yes, Your Honor. I think that's correct.

THE COURT: All right.

Q Doctor, let me ask you another question here. I'm going to show you a document that I have here which purports to be a copy of the report from St. John's Mercy Hospital dated 5/27/65—

[33] MR. WILLIAMS: Your Honor, I'm going to object to this unless a proper foundation is laid.

MR. WEISS: I haven't moved for its admittance yet.

MR. WILLIAMS: I will object to any statements made identifying that paper, because it is going into evidence, Your Honor, and I would certainly object.

THE COURT: Well, whether it is admissible or not the Court reserves its ruling. He may identify it or not. I don't know.

Q (By Mr. Weiss) Doctor, on one page it says here—

MR. WILLIAMS: I will object to anything that is said on that paper that is not in evidence, Your Honor.

THE COURT: Well, it is not in evidence yet, counsel.

MR. WEISS: No, it is not in evidence yet. I was asking for a interpretation of some of the language before I introduce it in evidence.

THE COURT: Well, at this point I don't know what it is. It's just a piece of paper. The objection will be sustained.

MR. WEISS: Your Honor, then I ask that this be admitted into evidence for the reason that I had written the medical records librarian, and a copy of my letter, a response from her to that letter and the attached St. John's Mercy Hospital official record—

MR. WILLIAMS: I would responsibly object, Your Honor, [34] as hearsay and no proper foundation has been laid for the admission of this evidence. And exchange of letters, Your Honor, is not the proper foundation that should be laid.

MR. WEISS: Your Honor, I think it is a proper rule of evidence to show that a reply letter can be admitted, establishing the authenticity, at least, of the requested material.

MR. WILLIAMS: It doesn't correct the hearsay that is involved, Your Honor.

MR. WEISS: Your Honor, I think that the hearing on Mr. Drope's trial, hospital records were admitted into evidence over the objection of hearsay made on the part of the defendant in that hearing.

MR. WILLIAMS: Your Honor, I respectfully submit that that which is already in the records speaks for itself.

THE COURT: Well, I am going to sustain the objection on several grounds. It doesn't show that that is the complete record to begin with and you will show it to counsel. I don't know what the materiality is. This is '61, isn't it, or '65?

MR. WEISS: This is 1965. These are copies. I have the originals in my file over there, if that is what you are sustaining the objection on, that these are copies.

THE COURT: Well, they are separate pieces of paper. It doesn't look like it is a complete record the way it is presented to the Court, so the objection will be sustained.

[35] MR. WEISS: Your Honor, I would like to make an offer of proof then, if I may.

THE COURT: All right.

MR. WEISS: Your Honor, I don't propose to prove anything by this, except the fact that there is a past history of mental disorder, at least, and that if at the time of the trial he would have been given a mental examination this eivdence would have been brought out. The evidence being, that in 1965, St. John's Mercy Hospital, the defendant was admitted for a severe injury of the back—

MR. WILLIAMS: Your Honor, I must respectfully object to this offer of proof.

THE COURT: He can make an offer of proof. It will be overruled. You may proceed.

MR. WILLIAMS: May I just complete my objection. He is doing by indirection what he cannot do directly.

THE COURT: It will be overruled.

MR. WEISS: And that report shows that at that time he had anxiety, hysteria, severe. Also, that he admitted a fear of surgery, such that a diagnosis was

made that he was psychoneurotic and anxiety hysteria, severe. Prognosis, poor. Also he was very manneurotic at this time, almost catatonic in behavior. Posture in rigid manner. Under these circumstances, the report goes on, the general type of behavior, I believe, it shows here he should have psychiatric evaluation [36] before surgery is contemplated.

THE COURT: What is the date of that?

MR. WEISS: It is dated 5/27/65.

MR. WILLIAMS: I object on the further grounds, Your Honor, that it is immaterial and remote from the event.

THE COURT: Well, he has made his offer of proof and I have sustained the objection. The main purpose of sustaining the objection is these are separated sheets of paper. I don't know what else is in it. It doesn't conform with the business records.

Q (By Mr. Weiss) Dr. Shuman, are you familiar with a doctor named Eli Robins?

A Yes, I am.

Q Who is he, Doctor?

A He is chairman and a professor of psychiatry, Washington University Medical School.

Q Are you also familiar with Edwin H. Schmidt?

A Yes.

Q Who is he, Doctor?

A He is a psychiatrist in private practice in St. Louis.

Q How about Patricia O'Neal, Dr. Patricia O'Neal?

A Also in private practice and I think also associated with the University of Washington.

Q From your knowledge in your profession of psychiatry, are all these competent psychiatrists?

A Yes.

Q Doctor, would you agree with the statement that I am [37] about to read to you that psychiatrically well persons never or rarely make suicide attempts, regardless of the severity of the social stresses to which they are subjected?

A That is a reasonable statement, yes.

Q Would you also agree with that statement—

MR. WILLIAMS: Your Honor, I'm going to object to these questions, because no proper hypothetical questions are being asked upon which the basis of the doctor's answers could be given.

MR. WEISS: Your Honor, I am just asking whether he agrees with the statements.

THE COURT: I am going to give counsel wide latitude. I don't think it meets the test requirements of the statute at all to set up the defense of mental incompetency, but I am going to give him wide latitude. I think really the objection is well taken, but I am going to give him wide latitude.

Q (By Mr. Weiss) Doctor, do you know whether or not these persons have ever made a study on attempted suicide?

MR. WILLIAMS: That will be objected to, Your Honor. It clearly calls for the operation of somebody else's mind.

THE COURT: If he knows. It may be an accepted fact in the field which they have reported. He may have participated. If he knows of his own personal knowledge, the objection will be overruled.

A Yes. There are many studies on suicide.

[38] Q Including these three persons?

A Yes.

Q Also are you familiar with a Dr. Wesnick a psychiatrist?

A I'm familiar with his name. He's in California, a special suicide study group.

Q He is in a special suicide study group in California?

A Yes.

Q Would you agree with this statement: Any person clearly about to commit suicide is in need of immediate and definitive treatment?

A Very much so.

Q Doctor, based upon your knowledge in the field of psychiatry, your educational and practical background, do you have an opinion as to whether or not a person who attempts a suicide, whether or not that act of attempted suicide would be reasonable cause to believe one

might not be mentally competent at that time to understand, say, the proceedings around him, if he was in the midst of a trial?

A This is a possibility.

Q It is a possibility. Why I'm asking you, would that be reasonable cause to still believe, that he might not be—

THE COURT: Well, pardon me. Let's proceed, counsellor. Let's don't engage in possibilities. I think he can say that if a man is accused of rape and committed, or murder, there is always a possibility he may be mentally sick, not only suicide.

Q I am asking, is there reasonable cause to believe [39] that though?

A There is reasonable cause.

MR. WEISS: I think that's all the questions I have of Dr. Shuman at this time.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Doctor, if a man were to invite four other men to go to his home and there he participated in rape and sodomy on his wife, and this man is in the midst of trial and four witnesses, including the principal witnesses, have testified to these acts, would a man in such a condition or could a man in such a condition deliberately and willingly and voluntarily shoot himself to present continuance of that trial?

A It's certainly a possibility.

Q Now, doctor, you examined this man on the 20th of February; is that correct?

A That's correct.

Q And is it not correct that on the 20th of February you found him to be in good physical health?

A Yes. I didn't do an actual physical examination. It was a simple exam.

Q You found him at that time to be free from psychosis?

A Yes.

Q You found him to be cooperative and responsive in your examination?

A Those are broad terms but he was fairly cooperative, but at times he wasn't very responsive. He was a very, very nervous man.

[40] Q Doctor, did you find him laboring under such a mental state of defect that he did not know that he was in your office?

A No.

Q In fact, you gave him some samples, medical samples; isn't that correct?

A Yes.

Q Why did you give him those medical samples?

A He was a very nervous man.

Q This was to settle his nervous condition?

A That's right.

Q The same type of medical samples that you give any other person with a nervous condition; is that correct?

A More or less.

Q You gave him an examination concerning his mental abilities; is that correct, doctor?

A That's correct.

Q You found him to be a man of low normal intelligence; is that correct, doctor?

A Very low normal. In fact, I later changed it to borderline.

Q You didn't say very low—

A In the next—

Q —in your report.

A In the next to last paragraph I called him a borderline mental deficient.

Q You also found that he could answer in judgment questions?

A That's correct.

Q He was able to answer judgment questions, but you [41] went further to stress, without trouble; isn't that correct?

A That's right.

Q At the time that you examined him, doctor, you feel that he needed to be institutionalized?

A By institutionalized, you mean could he use the services of a hospital?

Q Yes.

A I think he certainly could have used the services of a hospital.

Q In an in-patient way?

A Yes, sir.

Q You also said in this report that you felt that the medication that you or some doctor would give him would be such that he would be able to work efficiently? Didn't you say that in that report? I'm not sure. Where do you find that?

A I find it on page 3, second paragraph.

Q Thank you doctor. I only read it. You spoke with this man for an hour and a half; is that correct?

A Yes. When I wrote was I hoped it would help him.

Q Pardon me?

A When I wrote, I gave him the medication in the hope that it would relax him so he would be more efficient.

Q Now, doctor, this anxiety that Mr. Drope seems to have exhibited, I get the impression from your report that this anxiety was intensified because of this court case that was coming up?

A I felt that was certainly true.

[42] Q And you discussed the court proceedings with him?

A I don't think so.

Q You didn't?

A No.

Q How did he come to come to you, doctor?

A He was sent by his attorney. Hhe showed up with his wife.

Q You discussed the matter with his attorney?

A Yes.

Q And he requested a report from you?

A Yes, he did.

Q And at no place in this report did you relate that this man was under such a mental state of defect that he could not understand a court proceeding?

A That's correct.

Q And at no place in this report did you state this man was under such a mental defect that he could not aid and assist his counsel; isn't that correct?

A That's correct.

Q Is it not also correct, doctor, that at the time when you examined this man you felt that he was cooperative but he was of borderline intelligence, but could speak with his lawyer; isn't that correct?

A That's correct.

Q The fact of the matter is, in coming to your office he was following the advice of his lawyer; isn't that correct?

[43] A That's correct.

MR. WILLIAMS: No further questions.

THE COURT: Do we have this report? It is in the file, in the original case. This report that he is now referring to was filed in court. It is in the file.

MR. WILLIAMS: It was appended to Mr. Watson's motion.

THE COURT: Pardon me just a moment. And attached it to the motion for continuance, so it was before the court.

MR. WEISS: Yes.

THE COURT: It was before the judge in Division 16 and also the judge in Division 19 where the case was assigned for trial. I just wanted the record to show that. It is addressed to Mr. Weiss, the attorney for defendant, who arranged for the psychiatric examination—

THE WITNESS: Yes, sir.

THE COURT: —on behalf of his client. All right. Do you have any further questions?

MR. WEISS: Yes, I do, Your Honor.

REDIRECT EXAMINATION

BY MR. WEISS:

Q This report, doctor, was made by you February 22nd, it was dated; right?

A Yes.

Q And you had interviewed him on February the 20th?

A That's correct.

Q This was approximately one, two, three—four months [44] before he was tried; right?

A That's correct.

Q At this time, doctor, was there any evidence at all that you could have ascertained—if you had made the examination with the intent in mind of determining—whether he might be contemplating suicide?

A There was no evidence of suicide at that time.

Q No evidence that you saw at that time?

A No.

Q He was extremely nervous?

A Extremely so.

Q Now, doctor, our statute says that a mental disease or defect sufficient to give rise to a cause here where a man might not be able to understand the proceedings around him, does not mean any type of medical classification, but what it means is a type of mental disease—

MR. WILLIAMS: I will object to this. Calls for a conclusion of law which the doctor cannot make.

THE COURT: Well, that may or may not be, Mr. Williams, but I would like to have it explained to me, too. I sometimes wonder. But go ahead, counsel.

Q But it means merely a disorder sufficient to cause the results indicated. We are not talking about any mental disease or defect, psychotic or neurotic, but, in your opinion, a man who attempts a suicide, based on the hypothetical that Mr. Williams just gave you, he has been accused of taking four of his buddies home and raping his wife and standing trial [45] and actually goes to court for one day and hears testimony, comes home and makes an attempt on his life early the following morning. Would that give you reasonable cause, as a psychiatrist, to believe that he might have such a mind that it might not be able to allow him to proceed with the trial?

A Yes, that does give reasonable cause.

Q Doctor, did you prescribe any medication for Mr. Drope when you examined him on February the 20th?

A Yes, I did.

Q Generally what type of medication was that?

A It was a tranquilizer medication.

Q Did you give him a prescription along with it?
A Yes, I did.
Q Could it have been filled without getting a written order from you?
A No.
Q It could not be refilled without getting a written order?
A No.
Q The prescription you gave him, do you remember how much medication, how long it could have lasted?
A No, I don't.
Q In that report, as I understand it, it did recommend further psychiatric care; is that correct?
A Yes.
Q One of your conclusions was that he had a chronic anxiety reaction with depression. Could you explain a little [46] bit about what that means?
A That means the patient is markedly anxious and intense, not for one day but for a long period.
Q Psychiatrically speaking, a man in this condition, could his judgment be impaired in any way, could his reason be impaired?
A His reason I feel would be impaired. Are judgment and reason synonymous?
Q Only if you think they are.
A I think his judgment would certainly be affected by his condition. I guess that would be slightly impaired, but not completely impaired.
MR. WEISS: I think that is all the questions I have at this time, Your Honor.

RECROSS-EXAMINATION

BY MR. WILLIAMS:

Q Doctor, this report, you say in it somewhere that you didn't find that he was depressed in any way?
A I think in my final diagnosis I put down that I felt the depression was part of his problem.
Q In the earlier part of the report, doctor, you said he was not depressed?

A I think that is correct.

Q So at the beginning he was not depressed, but at the end he was depressed?

A I think I changed my mind about that.

[47] Q You changed your mind about that?

A Yes.

Q Now, doctor, if a person who has been on trial, as I have suggested earlier, were to shoot himself while his mother, brother are nearby, transported him to the hospital quickly, if this person while conscious were to tell a police officer "I shot myself because I didn't want to go to trial" would that make you think that that man was doing something that he did not know he was doing?

A It would not make me think that, no.

Q The fact of the matter is, you think that all of his faculties were about him; isn't that so, doctor?

A You say all—

Q Enough faculties to know why he was doing what he was doing?

A Not necessarily.

Q If he were to have told the policeman he did not want to attend the balance of that trial, and the fact of the matter is that he didn't attend the balance of that trial because of the wound he inflicted upon himself, would that not make you think, doctor, this was a man who was doing what he wanted to do and that he knowingly did what he did?

A I would have to go further than that and find out why he would think this in the first place—was he mentally ill in the first place, for example.

Q Well, on the 20th of February you spoke with him [48] for an hour; isn't that correct?

A About an hour and a half.

Q An hour and a half. You didn't think he was mentally ill on that day, did you?

A Yes.

Q Define mentally ill.

A He was certainly mentally ill on that date.

Q You say mentally ill. Define mentally ill.

A He did know where he was and he knew what he was doing. I think he was not psychotic.

Q He was not. The fact of the matter is, in the report you say he was not psychotic?

A Yes.

Q In fact, you go right on and say he was not suffering from any delusions, illusions, hallucination, obsessions, ideas of reference, compulsions or phobias at this time?

A That's correct.

Q Doctor, is it not true that we don't know the state of a person's mind who is going to commit suicide, because the person who commits a suicide does so and we don't know what caused him or her to do this act?

A You mean in general?

Q Yes.

A This is not true. This has been well researched. People who have made the suicide attempts have later been examined psychiatrically and they came up with many conclusions as to what their state of mind was at the time it happened.

[49] Q Of the attempt?

A Yes.

Q But those that complete the act, we don't know the state of their mind, do we?

A That's right. But when you say, you mean accomplished the act of killing themselves?

Q Yes.

A We have examined the ones who have tried it and didn't succeed.

Q But we don't know about those who have accomplished it?

A Obviously.

Q Because usually they go up on buildings, jump off, put a gun to their head and shoot themselves in the head?

A Yes. I have talked to two people who shot themselves in the head. There are different ways. Some drown themselves by jumping off a bridge.

Q A person who wants to kill himself, doctor, would shoot himself or herself in a vital spot, wouldn't they, if they really meant to do it?

A If they really meant to do it they would shoot themselves in what they consider to be a vital spot.

MR. WILLIAMS: I have nothing further.
MR. WEISS: Just a few questions.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Doctor, you said after you examined him he was in need of further psychiatric care; right?
A Yes.
[50] Q At that time you thought he was mentally ill?
A Yes.
Q Now, doctor, a man who was in such a state of mind that he couldn't understand the criminal and legal proceedings about him would not necessarily have to be sick, would he?
A That's correct.
Q He could be neurotic?
A Yes.
Q He could be suffering from such a mental state or mental condition that might go as far as psychotic.
THE COURT: And he might be ignorant and uneducated.
MR. WEISS: Yes.
THE COURT: Gentlemen, you both are engaging in so many possibilities where the Court knows that and has had testimony so many times that according to psychiatrists if a person commits murder or commits rape or robbery with a dangerous and deadly weapon, that in itself, according to the psychiatrists, calls for a psychiatric examination. Right?
MR. WEISS: That is our point, Your Honor.
THE COURT: Then we will have to have these psychiatric examinations on every man charged with a felony or with a rape, robbery, murder and this is the point these psychiatrists contend.
MR. WEISS: We are talking specifically here about suicide, Your Honor.
THE COURT: Well, that is begging the question.
[51] Let's proceed.
MR. WEISS: No further questions.
MR. WILLIAMS: Just one or two others.

RECROSS-EXAMINATION

BY MR. WILLIAMS:

Q Doctor, you haven't participated in any studies on suicide, have you?
A No.
Q None at all?
A No.
Q So what you are talking about here is what you heard or read somewhere?
A Yes.
Q You have no personal knowledge of it yourself at all?
A Except for persons on suicide attempts. I have examined people who have tried to commit suicide.
Q But you have made no study of this area?
A No.
MR. WILLIAMS: No further questions.
MR. WEISS: That's all the questions we have of this witness.
THE COURT: All right. You may step down.

(Witness excused)

MR. WEISS: I would like to call Miss Norma Snowden who is with the medical records department at City Hospital Number 1.
NORMA SNOWDEN, of lawful age, a witness called by the movant, having been first [52] duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q State your full name for the record, please.
A Norma Snowden.
Q Are you employed by the Medical Records Department of City Hospital Number 1?
A I am.
Q Are you here pursuant to a subpoena directed to the Medical Records Librarian at the City Hospital?

A Yes.

Q Did you bring with you a complete report of all the medical records and information on one James Edward Drope?

A Yes, I did.

Q Made at City Hospital Number 1?

A Yes.

Q Were these records made in the regular course of business at the hospital?

A Yes.

THE COURT: Show them to Mr. Williams so that he may admit for the purposes of saving time that they are the records of the hospital. Are those the records you have on this man, James Edward Drope?

THE WITNESS: Yes.

MR. WILLIAMS: Yes, Your Honor, they appear to be the records.

THE COURT: Without admitting any materiality or [53] relevancy as to any parts therein it is admitted by counsel to be the hospital records, kept in the regular course of business?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: All right.

Q I would like to point out part of one of the documents in these records that we are referring to that you brought along with you. That is a consent to operations; is that right?

A Yes.

Q Now, is this normally, do you have someone normally sign this before someone is operated on at City Hospital?

A Yes.

Q A regular routine practice?

A Right.

Q Who usually signs that, do you know?

A The patient.

Q If the patient isn't able to sign that, who signs it then?

A The closest relative.

Q Now, would you read the signature on the consent to operation?

A Donald McCleary.

Q Would you look at the time and date that consent to operate was signed?

A June 25, '69, at 8:40 a.m.

Q I am also going to show you a page which is titled "Nurse's notes." Do you understand what that is?

A Yes.

[54] MR. WILLIAMS: Nurse's what?

MR. WEISS: Nurse's notes.

Q (By Mr. Weiss) How are these made?

A The shift of nurses on the floor make the notes at certain times.

Q Now, could you read the top line of this, what we are referring to as nurse's notes, please, and give the date and the time it was made?

A June the 25th, 1969, 12:50 p.m., admitted to division via stretcher.

Q Via stretcher?

A Placed in Room 308, unconscious. Blood pressure 110/60, pulse 68. J. Miller.

Q Would that be the nurse that made it, J. Miller?

A Yes.

Q Here is another nurse's notes here preceding that page you have just read off of, also seem to be dated 6/25/69; is that right?

A Yes.

Q Could you explain what that chart is, what it means?

A Well, this is the nurse's admission notes.

Q That is made on admission?

A Right.

Q Is there a check mark by "unconscious" there?

A There is.

Q Would that, in your opinion, mean that he was unconscious when he was brought into the hospital?

[55] A No.

MR. WILLIAMS: I didn't hear that.

Q (By Mr. Weiss) Would it necessarily mean that?

A No.

Q What would it be?

A He was unconscious when he made it to the floor.
Q When he made it to the floor he was unconscious. Could you explain to the Court, please, what you mean by made it to the floor?
A When the patient is first brought into the emergency room—
Q What is the location of that?
A That is on the ground floor. Then to OR.
Q That is the operating rooms; is that right?
A Yes.
Q Where is that located?
A Second floor. Then he goes to the floor.
Q Then he goes to the floor?
A Yes.
THE COURT: May I ask a question?
MR. WEISS: Yes, Your Honor.
THE COURT: Give me the time and the date of the admission and the time and date of discharge, please.
THE WITNESS: He was admitted on June 25th, 1969 at 8:35 a.m., discharged on June 26.
THE COURT: June the 26th?
[56] THE WITNESS: Yes.
THE COURT: What time?
MR. WEISS: Your Honor, I think that is correct because he was transferred to Homer Phillips Hospital.
THE WITNESS: Discharged from City Number 1.
MR. WEISS: Right. I think you will further find—
THE COURT: Pardon me, if you don't mind, counsellor, would you mind letting me ask a few questions, then you may correct anything you think needs correcting.
THE WITNESS: Discharged on June 26, 1969, 2:35 p.m., on the 26th.
THE COURT: 2:35 p.m. Do your records show that he went home or where he went or anything?
THE WITNESS: Yes, sir. He was transferred then to Homer G. Phillips Hospital.
THE COURT: On what date?
THE WITNESS: The 26th.
THE COURT: When was he discharged from Homer Phillips, do you know?
THE WITNESS: No, I don't.

MR. WEISS: Your Honor, I think I have something that may clear that up here. (handing document to the Court)

THE COURT: According to this, the date of discharge was July 15; is that right?

MR. WEISS: Yes.

[57] THE COURT: All right. I have no further questions. Thank you.

MR. WEISS: I have no further questions, Your Honor, except I would like to keep that here because we have another doctor out in the hall who may be able to testify as to some of those records.

THE COURT: Do you have any questions of this witness?

MR. WILLIAMS: I just want to finish reading this, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q On the afternoon of the 25th, counsel mentioned the chart showing that Mr. Drope was unconscious. This was after the operation; isn't that correct?

A Yes.

Q And he was still under the influence of the general anesthesia?

A Well, I couldn't tell.

Q Can you look at that and tell us whether or not he was anesthetized?

A It doesn't say.

Q Does it show that he was operated upon?

A Yes, he was, under general anesthesia.

Q Counsel also showed you a form that was signed by somebody else other than the patient; is that correct?

A Yes.

Q When one comes to a hospital with other relatives, [58] isn't it usual that before they work on a person that some close member of the family signs that sheet?

THE COURT: If you know now.

A As far as I know, the patient would sign it if he is able, and here there was two—I just noticed there's two operation consents and one is signed by him.

Q What did you just find in the record?

A There is two consents to operate.

Q One was signed—

A One was signed by James Drope and the other was signed by his stepfather.

Q Now, could you tell us when they were signed?

A The one signed by the stepfather was on the 25th of June at 8:40 a.m. and the one signed by James Drope was on 6/25 at 9:10 a.m. He was in the operating room when that one was signed.

Q May I see the one that he signed?

A Yes. (handing)

MR. WILLIAMS: I have nothing further.

MR. WEISS: Just a few questions, Your Honor.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Norma, the first one was signed at 8:40. That was by James Donald McCleary; is that right?

A Yes.

[59] Q There is also one signed by what appears to be James Edward Drope at 9:10 in the operating room; is that correct?

A Yes.

MR. WEISS: Your Honor, I would like to show you the character of that signature for your own observation.

MR. WILLIAMS: It appears to be written James Drope.

THE COURT: What is the point?

MR. WEISS: Well, Your Honor, I would like to compare that with the signature made earlier by him, also in the record.

THE COURT: The trouble with that is, what does that signature show me?

MR. WEISS: It proves, Your Honor, I would like to offer this as an offer of proof, whether it is accepted by

the Court or not, but it looks like it was written by someone who could barely move his hand and who could barely see. There is an X mark there and the scribbling down the page.

THE COURT: I can see that, but it may be due to his excited condition, it may be due to the position he was in when he was offered it to sign, there's a hundred and one things. Without the witness or without the parties there to testify the bare signature in itself hardly indicates anything, really. Does it, counsel?

MR. WEISS: Except it is evidence, I think cooperative [60] evidence of what the defendant may testify to later on.

THE COURT: All right.

MR. WEISS: Anyway, I think, if this is not already in evidence, I would like to offer the complete hospital record into evidence at this time.

MR. WILLIAMS: I have no objection to these records.

THE COURT: All right.

(Witness excused)

MR. WEISS: I know we started late. Could I have about a ten minute recess here to talk about a prospective witness who is out in the hall?

THE COURT: How many witnesses do you have?

MR. WEISS: I have got three more witnesses, Your Honor, in addition to the defendant, so that is four altogether.

THE COURT: Well, let's proceed now as soon as we can.

MR. WEISS: Your Honor, as our next witness I would like to call Mr. Jon Tek Lum.

JON TEK LUM, of lawful age, a witness called by the movant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q Dr. Lum, for the record, could you state your full name, please?

A Jon Tek Lum.

[61] THE COURT: How do you spell the last name?

THE WITNESS: L-u-m.

Q (By Mr. Weiss) Doctor, what is your present address?

A My present address is 9378 Olive Boulevard. That's my office. And my home is 142 Willowbrook Drive in St Louis. I also work at Malcolm Bliss Hospital.

Q Doctor, could you tell the Court your profession, please?

A I am a psychiatrist.

Q What is your education and background, please?

A I had pre-med education at Brown University for four years, Bachelor of Arts degree, then a four year education in medical school or M.D. at Tulane University in New Orleans I served a year of internship at Michael Ries Hospital and then a three year residency here at Washington University Department of Psychiatry in 1964 to 1967. Then I served as the chief of psychiatry at Langley Air Force Base in the Air Force for two years. Then after that I worked at Malcolm Bliss as the Director of Forensic Services since 1969.

Q Could you explain to the Court what your duties are and what is your job as Director of Forensic Services at Malcolm Bliss?

A At Malcolm Bliss we do the pre-trial examinations for defendants that are filing motions, usually under the 5.52 statute, for responsibility or to see whether they are competent to stand a trial. Also pre-evaluation to find out [62] if people are ready for discharge under the statute. We also examine the criminal sexual psychopaths and make evaluations on that aspect also.

Q In other words, doctor, you handle the proceedings under chapter 5.52 of the Missouri Revised Statutes; is that correct?

A That is correct.

Q For the Circuit Court of Criminal Causes in St. Louis?

A Yes, we do that.

Q And you are familiar with chapter 5.52 of the Missouri Revised Statutes; is that correct?

A Yes, I am.

Q In view of that chapter, doctor, you are called upon to make decisions whether a man is mentally competent to proceed with the trial; is that correct?

A That is correct. That is one of the requirements that we are asked to make in our report. There is a section of the 5.52 that outlines our examination when we make an examination for that and also criminal responsibility, and whether a man needs to be hospitalized.

Q Now, doctor, do you recall whether or not you personally or anyone under your charge examined James Edward Drope, the defendant sitting behind me at the counsel table while you were director of forensic services at Malcolm Bliss Hospital?

[63] A I do not recall that.

Q Doctor, do you have an opinion as to whether or not a person who has just attempted suicide during the course of his trial in which he has been accused of raping his own wife with four of his friends, whether or not he might be in need of psychiatric care?

A Yes, I do.

Q What is your opinion, doctor?

A I feel that a man that has committed an act such as raping his own wife, or allegedly raping his own wife, and then afterwards during the trial, in the process of the trial, makes a suicide attempt is in need of at least a psychiatric evaluation to find out his mental condition.

MR. WILLIAMS: That is objected to. It's clearly not responsive to the question.

THE COURT: The question was, was he in need of psychiatric care.

THE WITNESS: Well, I can't really state whether he needs psychiatric care. I think he needs to be evaluated to find out—

MR. WILLIAMS: I would object to anything past the first sentence and move it be stricken.

THE COURT: Well, I will overrule it. I thought he said he didn't know, but maybe he didn't. That is assuming he actually wanted to take his life.

[64] THE WITNESS: Well, the thing with psychiatry is you have to evaluate what you have. I couldn't make a definite answer to whether he needed treatment or

not. Some people may need treatment or he may need treatment, but you at least can examine a patient to find out if this is a necessity.

Q (By Mr. Weiss) Doctor, let me ask you this: With your familiarity with chapter 5.52 and under your duties as Director of Forensic Services and your work with the Circuit Court of Criminal Causes here, your interpretation of that chapter, do you think that in this instance where a man was accused of raping his wife with four of his buddies and attempted suicide during his trial, do you think that would be reasonable cause to believe that he might not have the mental capacity to proceed with the trial?

MR. WILLIAMS: That is objected to. It calls for a conclusion of law.

THE COURT: Yes but it will be sustained.

MR. WEISS: Your Honor, this is a man that works for the state—

THE COURT: Pardon me. The courts and the statutes and the law have not completely surrendered their power to psychiatry. Maybe we should. but we haven't.

MR. WEISS: I'm asking for his opinion though, and the chapter under—

THE COURT: Well, you used the terminology, you [65] referred to in the statute. There are two sections in the statute, one that refers to whether or not a person is free of responsibility and the other as to whether or not he is fit to go to trial and cooperate with counsel. Now, what does he mean by cooperate with counsel? To what extent was he to cooperate with counsel? This man did, I assume, cooperate with counsel at least for a while. He did consult with Mr. Watson, he was out on bond, he was examined by a psychiatrist that very February. These are all things that he is going to have to take into consideration, and not to just a mere conclusion, sitting there on the stand and telling the court and the Judge that you ought to have had a psychiatric evaluation but you can ask him his opinion, but you have to make a more reasonable basis, because in any case where we try a man and he inflicts an injury on himself we would have to stop proceedings. As the

Supreme Court stated, it is entirely up to him. You are assuming that he actually tried to kill himself here. There is another assumption. I don't know whether he did or he didn't so far. All right. You may proceed.

MR. WEISS: All right, Your Honor.

THE COURT: The only thing is, I am sustaining the objection because you are asking for a conclusion of law and for this psychiatrist to substitute his judgment for the Court. You are going to have to lay more of a foundation to [66] get his opinion without just referring to the statute broadly. All right. Let's proceed.

Q (By Mr. Weiss) Let me ask you this, doctor: Did you read a report made by Dr. Shuman of February 22?

A Yes, I did.

Q Dr. Lum, I also showed you a report, an official city record of City Hospital here.

A Yes, sir.

Q Did you read part of that?

A Yes, I did.

Q Did you find any evidence in there that the man had a history of mental trouble?

A Yes, I did. Actually, it was interesting, that I examined the defendant sometime in 1965. I wasn't aware of this until today when you refreshed my memory that as a psychiatrist resident we did a psychiatric consultation at that time and did find that he did have some psychiatric problems and was in need of psychiatric care and treatments.

Q In view of this background, doctor, in view of the fact that this man attempted to rape his wife, he has been accused of that I believe, along with four of his buddies, in view of the fact that that examination took place on February 20, the report was made February 22 by Dr. Shuman, in view of the fact that he did have counsel, without any facts in the record now that he consulted with counsel or the extent [67] of that consultation, that he went to trial on June the 23rd, and on the early morning of June 25th he was found shot in the stomach, apparently the weapon being a .22 caliber rifle, laying close by. On the basis of this back-

ground and this information and under your interpretation of the statute, do you think that there is reasonable cause to believe that he might not have been fit to proceed with his trial?

MR. WILLIAMS: It is objected to, Your Honor.

THE COURT: It will be sustained.

Q (By Mr. Weiss) Without your interpretation of the statute, in your opinion as a psychiatrist, doctor, without any legal reason at all or without any statutory language, do you believe there is a reasonable cause to believe that this man had a mental condition so that he could not intelligently have proceeded with his trial, consulted with his counsel and understood the proceedings around him?

A I have an opinion. I think if a man makes a suicide attempt on his life, shooting himself in the abdomen, I think this is a serious psychiatric indication that the man has a problem and needs to consult with a psychiatrist or should see a psychiatrist. On that basis, people that make suicide attempts, some eighty-five per cent of them have a true psychiatric disorder. Dr. Robins and some of the other people at Washington University found that a lot of these people do in fact suffer from a psychiatric illness [68] and show poor judgment. This suicide attempt, it does indicate poor insight and judgment. They also may have some distortions or irrational thinking, they may be severely depressed, and for these reasons, they should seek the help of a psychiatrist.

Q Now, doctor, we don't know whether he was mentally incompetent or not without an examination; is that correct?

A That is correct. I couldn't conjecture as to whether he was competent to assist in his own defense.

Q These factors in your mind would be a reasonable cause to believe that there might be something that would warrant a psychiatric examination—

A Yes.

Q —to make the determination whether or not he was mentally competent to understand the proceedings around him and cooperate with his counsel?

A I would feel that it would be prudent or wise to make a evaluation at that time, because one doesn't really know his condition but it could be that he had various causes for taking his life, but whether it was due to a true psychiatric disorder or something else we really don't know until an evalaution is made and one would have to try and determine whether he was acting irrationally at that time.

Q If he was acting under a mental disorder that caused him to make this suicide attempt on his life, he might [69] not have done it, so called intentially or wilfully with complete control of all his faculties; is that correct?

A That is correct.

Q There could be a lot of, say, subsconscious thought about this in terms of trying to save his life or somehow getting out of the particular stress he was in.

A We really don't know this until one examines the patient and goes into it in further detail, but at least I think he should be evaluated to find out whether he could—whether he knew the proceedings against him or cooperate with his counsel.

MR. WEISS: That's all the questions I have at this time, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Doctor, the word suicide is a conclusion that is being made here, isn't it, someone that shoots himself saying he was trying to kill himself; is that correct? That is a conclusion that has been made, isn't that so?

A Well, it depends on how far you take an act such as this. You could say a person that has a gunshot wound of the abdomen that was self-inflicted. Now, whether you equate this as a suicide attempt or not, I think as a psychiatrist I would say that was a suicide attempt. That would be my opinion or conclusion.

[70] Q Now, doctor, if the man that did such a thing were to have told a policeman while at the hospital "I

shot myself because I did not want to continue with the trial" would this indicate to you as a psychiatrist that this was a man that committed an act knowingly?

A Well, it may mean that he had some thought about the trial and the stress that he was under and may give you a superficial explanation of why he did this, but it may not go into the complete details of whether the man was depressed at that time, whether he was suffering from a psychiatric disorder at that time or whether he was just doing this as a way out of the trial. I don't think you really know, just on that verbatim statement. There are a lot of other things one would have to go into, such a finding out the man's previous psychiatric history, whether he had in fact seen a psychiatrist, whether he was nervous during his life or whether he had periods of depression or whether he had ever seriously thought of making a suicide attempt when he was under stress. A lot of these things would have to come in, be brought up in an examination to find out whether he was, say, malingering or did it intentionally or if it was due to a true psychiatric disorder.

Q So are you saying, doctor, that if a man was on trial for having participated in a rape of his wife and he has told people before he committed the act, told people [71] after he committed the act of shooting himself, that he did it for the reason that he did not want to continue with the trial, that you would not know whether or not such a person was sane or insane or labored under a mental defect?

A We wouldn't know this until one has examined the defendant, because many times people make certain statements about themselves and it could be a superficial evaluation of why they did it, but we don't know the full psychiatric impact of such a statement.

Q Let me ask you this, doctor: If a man were to say to you that he was going to shoot himself and did shoot himself, would you not be able to determine his intent at the time now when he said that he was going to shoot himself?

A To what extent of intent are we talking about?

Q If a man says he is going to shoot himself, do we know he intended to do it at the time he said it if later on he shoots himself?

A I think it depends on his state of mind. Suppose he were delusional at that time and then later he cleared up. We don't know whether he really intended to do this or whether he was acting under his full capacity, his mental capacity.

Q Well, doctor, do we know at any one given time whether or not any human being is operating under his full mental capacity?

[72] A I think a lot of this would deepnd on an examination. Maybe we are supposedly expert in this field, to determine a man's rational capacity, whether he has the rationale to know that he is in full control of his own faculties, but whether he can make a rational judgment or say he was laboring under a lot of stress and pressures, say, like in this particular for instance in the trial where he did an irrational act, why was his judgment so poor, why did he take this way out? We don't know all the answers.

Q If he told you why he did, would you believe him?

A I think I would believe him if I had examined him and sat down and did a very through psychiatric examination.

Q Doctor, you say that you did psychiatrically examine Mr. Drope some while back?

A That's correct.

Q Is that reflected in the hospital medical records?

A Yes, sir, it is.

Q Can you pick it out for us? Did you write this, doctor?

A Yes, I did.

Q Well, would you read it to us? I can't read it.

A Apparently I saw him on July 15, 1965 as a psychiatric consultation and he had a chief complaint of having some pain out of proportion to his physical findings. Usually we go to referral, say, from the neurological service of the hospital and apparently he had a severe upset of low back pain after [73] he had pushed a car one day prior to the time he was admitted and there were—

Q Let me stop you at that point, doctor. According to that report, he had pushed a car one day before you saw him and he had low back pain and that gave you to believe something was psychiatrically wrong with him?

A No. What I'm saying, he was admitted to the City Hospital, apparently earlier than that. I would have to refer—

Q This is in your handwriting, is it not, doctor?

A Let me explain how we get a referral. When I was a psychiatric resident at City Hospital, people come into the neurological service. Apparently he came in for a pain in his back and the neurological specialist examined him and found that the pain was out of proportion of the laboratory studies and the physical diagnosis, so they thought perhaps he did have a psychiatric disorder, so they called in a psychiatrist to come in and examine the patient.

Q Was that you?

A That was me.

Q Did you examine him?

A Yes.

Q What was your finding?

A My findings, I said here, the impression was a conversion reaction with compensation factors considered and there was not any organic basis for the low back pain. The etiology was unknown but I also have, a character disorder, [74] sociopathic personality. It was my recommendation that—

Q How long did you talk to him at that time, doctor, to determine all of that?

A I can't really recall but it must have taken at least an hour or longer, because I wrote—this is a long report.

Q What is character conversion, doctor?

A Well, there are two or three diagnosis here. I said a conversion reaction. A conversion reaction is where a person may have some unexplained pain which cannot be shown through some physical findings, and it may be due to psychological psychiatric factors. A character disorder is a type of disorder that is a psychiatric diagnosis for a certain particular personality, psychiatric personality. It is also interesting to note

that I advised the patient be followed up or seen in the Malcolm Bliss psychiatric clinic and did prescribe a tranquilizer for him.

Q You found no psychosis, however, did you?

A No, I did not find any psychosis at that time.

Q Did it not find at that time that he was laboring under any such mental defect that he did not know where he was and what he was doing, did you?

A Well, if you want to ask that particular question, he was oriented at that time.

Q He was oriented?

A Right.

[75] Q Doctor, what does that mean?

A He knew who he was, where he was and what time it was.

Q You were able to speak to him and he was able to answer you?

A Yes.

Q You were able to communicate with each other?

A Yes.

Q Based on conversations you had with him and he had with you, you came to the conclusions you have in there; is that right, doctor?

A That's right.

MR. WILLIAMS: Nothing further.

MR. WEISS: Just a few questions—

MR. WILLIAMS: Oh, I forgot something.

Q (By Mr. Williams) Doctor, you said something about eighty-five per cent of the persons that attempt a suicide—what hapepns to the fifteen per cent?

A The other fifteen per cent are made up of other psychiatric disorders.

Q Well, you said that eighty-five per cent had psychiatric disorders. You said nothing at all about the fifteen per cent. Are you saying now one hundred per cent?

A I am saying that a lot of people make suicide attempts and eighty-five percent of them have, say, a chronic depressive illness or alcoholism, the others are made up of character disorders, schizophrenics, organic [76] brain syndromes and such as that.

Q You have known peolpe to deliberately do acts against themselves and not have any psychiatric problems, haven't you?

A I think this is just by the very nature that someone made a suicide attempt, for me, to me as a psychiatrist, I would say that they have some type of problem.

Q Doctor, do—

A Taking one's life or making an attempt on one's life to kill someone, to kill himself, I believe is a serious type of psychiatric problem.

Q Now, if this person were deliberately doing this and not to kill himself but to promote a result that they wanted, would you say that that is a psychiatric problem?

A Sure. It's just like, say, in this particular incidence, if a guy had low back pain and he were getting some compensation for it, even though you may know maybe he was trying to get the few extra bucks, he could, in fact be suffering from a psychiatric disorder. We don't know, just because a man may want to stop a trial, we don't know to what extent he was trying to do this, whether it was just a face-saving device or whether he really was severely depressed, under large strain, whether he was under a lot of pressure and things like that. We just don't know. I didn't examine the patient at that particular time, so I can't make any conclusion like that.

[77] Q Doctor, you said earlier if a person who had low back pain was trying to collect some money, are you saying that people deliberately do acts to themselves so they can collect insurance money and that type of thing?

A In compensation neuroses or a lot of things like this, people may have certain types of pains or aches over and above, say, what is found physically. Now, whether the guy is deliberately and wilfully doing this, I don't really know or care but as a psychiatrist I think, I say something is wrong with this guy, that he is taking this particular method of expressing his problem.

Q Well, doctor, would you say that a person who is in the midst of a trial with all of the evidence going

against him and everyone pointing his finger at him, that he would be in an emotional upset condition?

A I would say he certainly would be under a lot of pressures and—

Q Are you saying that under such pressure he might have the mental faculties to do something to relieve that pressure? Is that what you are saying?

A I am saying it is quite likely that apparently this man was under a lot of emotional upset and pressures and did something. Now, why he did it I am not making an evaluation, because I don't know all the circumstances. I didn't see the patient.

[78] Q Well, doctor, if you had seen him at the time that he was shot and he would have told you, given you all the circumstances that we have, that he had shot himself because he did not want to continue with that trial, what would your opinion be?

A I would have no opinion because—

Q You have no opinion?

A Because of the fact that I didn't see the patient, I didn't ask him the questions that I would ask him. One of the things I would ask whether he did in fact have a psychiatric disorder. There are certain parts of our mental examination that we go into very thoroughly to find out whether the person has a psychiatric problem or not.

Q Doctor, in making evaluations, as you have done at Malcolm Bliss, have you ever made evaluations that have come to court and the judge has overruled your evaluation and found that the man was competent to stand trial?

A No. Actually, the cases that I made evaluations on in terms of competency, the judge went along or went with our decision.

Q You say "went with our decision". Was there more than one person making the decision?

A I make the evaluation and it is up to the court to decide whether a man is competent to stand trial.

Q You said "we". Do you make that in conjunction with [79] some other psychiatrist or do you make it alone?

A I have made it alone. I have had some psychiatric consultation.

THE COURT: Sometimes you have the staff do it?

THE WITNESS: Yes.

MR. WILLIAMS: No further questions.

THE COURT: All right. Do you have further questions?

REDIRECT EXAMINATION

BY MR. WEISS:

Q Doctor, a man would not necessarily have to be psychotic to render his mental condition as such that he might not understand the proceedings around him and be able to cooperate with counsel or assist in his defense, would he?

A That's correct.

Q Pardon?

A That is correct. Actually, the statutes are fairly specific in terms of that, fitness to proceed, and I think they do outline, if a man knows the proceedings against him or is able to assist his own counsel. Apparently there is a line of discussion as to what requirements are needed in terms of assisting with his counsel, whether this has to be a rational man or irrational man or to what extent.

Q Given the facts in this case, assuming that a man in this type of trial has made an attempt on his own life, there would be reasonable cause to believe, would there not, [80] whether he might not be mentally fit to proceed?

A I think one would have to examine a patient like that to find out whether or not he was fit to stand trial or proceed.

Q So your testimony is there would have to be a thorough evaluation made to answer that question absolutely?

A Yes.

Q But there would be reasonable cause to show that an examination should be made?

A I think—

MR. WILLIAMS: Of course, that is objected to.

THE COURT: That has been asked a half dozen times anyway. It's repetitious. Let's proceed.

MR. WILLIAMS: I have a continuing objection to it.

THE COURT: How long would this examination take?

THE WITNESS: Usually your examinations don't take very long.

THE COURT: How long? A week? Two days, ten days?

THE WITNESS: People that we have had at Malcolm Bliss, sometimes it takes a week, sometimes a month or so.

THE COURT: All right. Thank you.

MR. WEISS: That's all the questions I have.

(The witness was excused.)

HOMER ELMER CASE, JR. of lawful age, the witness called by the movant, having been [81] first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q What is your full name?

A Homer Elmer Case, Junior.

Q How old are you, Homer?

A Nineteen.

Q Where do you reside now?

A 5220 Bulwar.

Q Is that in the city of St. Louis?

A Yes, sir.

Q Homer, are you married?

A Yes, sir.

Q Do you have any children?

A Two.

Q What is your occupation?

A I am a crossing watchman for the Norfolk and Western Railroad.

Q Homer, are you related in any way to James Edward Drope, seated here at counsel table in the courtroom today?

A Yes, sir.

Q What is your relation to him?

A Half-brother.

Q He is your half-brother?

A Yes, sir.

Q On what side? Do you have the same mother?

A Same mother.

Q Okay. Homer, how long have you known James?

A All my life.

Q Did you ever reside with him?

A Yes, sir.

Q Between what period of time did you reside with him?

A Well, I started staying with him, I think, it was [82] '64—

Q Speak a little louder.

A I started staying off and on with him, I think it was back in '64.

Q Until what time?

A '69.

Q At that time was he married?

A Yes, sir.

Q Was he living with his wife?

A Yes, sir.

Q Who was his wife?

A Mary Ann.

Q Mary Ann was his wife. Do you know whether he had any children?

A Yes. They had four at that time.

Q They had four children during the time that you lived off and on with him?

A Yes.

Q How many do they have now, do you know?

A Five.

Q Homer, on the morning of June 23, 1969, where were you?

A Is that the day the shooting took place?

Q I'm sorry. On the date of June 25, 1969, where were you? That was the day the shooting took place.
A I was at home.
Q You were at home, at the address that you gave?
A No. I lived at 5238 Bulwar.
Q 5238 Bulwar, is that right?
A Yes, sir.
Q Were you married at that time?
A Yes, sir.
Q Did you have any children at that time?
A One.
[83] Q On that morning, while you were at home, did anybody subsequently come to your house?
A Yes.
Q Who came to your house?
A Well, my brother, my stepfather, my mother, and Mr. McCleary.
Q Who is Mr. McCleary?
A Well, he is my ex-stepfather.
Q Okay. Was there anyone else in the house besides these people you just named?
A Yes. There was my wife, my little daughter and my brother's five children.
Q Your brother's five kids were at your house?
A Yes, sir.
Q How long had they been at your house?
A I believe it was about a week or two.
Q Do you know what they were doing at your house, or the reason why they were at your house?
A Yes.

MR. WILLIAMS: That is objected to, Your Honor, as being immaterial.

THE COURT: What is the purpose of this?

MR. WEISS: I think, Your Honor, we want to establish the scene where this attempt on his life took place.

THE COURT: Well, wasn't that done after the trial motion?

MR. WEISS: Your Honor, Mr. Case never did testify.

THE COURT: No, but you may want to bring in the [84] kids. They didn't testify either. I thought we went into what happened there.

MR. WEISS: Your Honor, one of the grounds that we have here is ineffective assistance of counsel. We don't think that counsel ever did talk with Mr. Case here or any of the other relatives at the time of that shooting. It was never presented before this court and I want to establish number one, that there was ineffective assistance of counsel because the facts we can bring out now should have been brought out that he—

THE COURT: Let's don't go on that basis. Perhaps he didn't talk to Mr. Watson, but he did produce some evidence. Let's proceed now.

Q Homer, on that morning, do you recall anything unusual happening?

A Yes. My brother was shot.

Q Your brother was shot?

A Yes.

Q When was the first thing that you heard or knew anything about his being shot?

A Well, Mr. McCleary came in the house and I was still in bed at the time, he came in the house and he said James was laying in back—

MR. WILLIAMS: I'm going to object to anything that was said by somebody else, Your Honor.

THE COURT: Sustained.

Q What happened? Did you see James laying out in back?

A Well, after I heard that James was laying out in [85] back, I went out there and I seen him laying out there.

Q At that time was he moving in any way?

A No, sir.

Q Was he able to speak?

A No, sir.

MR. WILLIAMS: That is objected to. It calls for the operation of his mind.

THE COURT: Well, he can tell whether he was laying there and whether he tried to speak to him and whether he got any response. Let's proceed.

Q Did you try to speak to him?

A Yes, sir.

Q Did he make any response to you?

A Well, he wasn't talking.

Q He did not talk?

A No.

Q You found him out there, laying there. How was he laying, describe the position he was in.

A He was just laying forward, stretched out more like he had been crawling.

Q Was he bleeding?

A Yes, sir.

Q What did you see when you observed him?

A Well, when I observed him I just saw him, then when I turned him over I seen his stomach was all blood, down the front of his pants here was blood and everything.

Q What did you do at this time?

A Well, me and McCleary picked him up, took him to the car and took him to the hospital.

[86] Q Took him in your car?

A Yes, sir.

Q Drove him to what hospital?

A City Hospital Number 1.

Q I'm going to show you a street map of the city of St. Louis that I have here, Homer. Would you point out to the court where Bulwar Street is on here?

A Well, right here (indicating).

Q Is that by Bellefontaine Cemetery—

THE COURT: Pardon me just a second.

MR. WILLIAMS: I object.

THE COURT: Just a minute. Is it up there just east of Broadway?

THE WITNESS: Yes—west of Broadway.

THE COURT: Up near Calvary Cemetery?

THE WITNESS: Yes.

THE COURT: I know the neighborhood.

Q Okay. And you drove him from Bulwar down to City Hospital Number 1; is that correct.

A Yes, sir.

Q Mr. Cleary was with you?

A Yes, sir.

Q At the time when you were driving him down there, did you attempt to speak to him?

A No, sir.

Q Did he in turn make any response to you?

A No, sir.

[87] Q What did his condition, physical state appear to you to be?

A Dead.

Q He appeared to be dead?

A Yes, sir.

Q Now, when you got him down to City Hospital Number 1, what did you do then?

A Well, when I got him there I pulled into emergency and I went in and I got this cart and then we put him on the cart.

Q Who got the cart?

A Well, I went in there and got the cart guy, he came out with the cart.

Q Did you help put him on the cart?

A Yes, sir.

Q Then where did he go to?

A Well, he was there in the lobby for a few minutes and then they took him into the emergeney room.

Q Were you able to go into the emergency room?

A I went to the door. Not all the way in.

Q Did you wait there?

A Yes, sir—well, I had to go to the clerk's desk.

Q In relation to the emergency room, where was the clerk's desk?

A Well, it was right just like from me and that prosecutor sitting there.

Q About from you to the prosecutor?

A Yes, sir.

Q Were you able to observe the emergency room while you were at the clerk's desk?

A Yes, sir.

[88] Q Now, Homer, at any time while you were there at the hospital, the emergency room and the clerk's desk, did you see any policemen?

A No, sir.

Q Did you talk to any policemen?

A No, sir.

Q Did any policeman talk to you?

A No, sir.

Q Now, Homer, how long did you remain at the hospital that day?

A I believe it was about 6:00 o'clock that evening.

Q Did anybody else from your family come down to the hospital that day?

A My mother and my step-father did.

Q Was Mr. McCleary also with you until 6:00 o'clock?

A Yes, sir.

Q After you left the clerk's desk, where did you go then?

A Well, I went back to the door.

Q The door of what?

A To the emergency room.

Q Okay.

A And then they brought James out, then went down the hall and I went down with them down the hall and got the elevator, then me and Mr. McCleary got up on the elevator, went to the operating room. We got off the floor at the operating room with them, with the doctors and my brother, and then after we got off on the floor and they started in the operating room they said we couldn't go no further.

[89] Q Couldn't go in the operating room?

A No.

Q Then where did you wait?

A We went downstairs to the lobby. From there we went back to three West, I believe is where he was at, back and forth, until we got—

Q Did you see James later on that day after he was brought out of the operating room?

A Yes, sir. I seen him when he got out of the elevator.

Q Did you try to talk to him?

A Yes, sir.

Q Was he able to talk to you?

A No, sir.

Q At any time, from the time you found him laying there in the back of your house and when you left the hospital at 6:00 o'clock, were you able to talk to James?

A No.

Q Did he talk to you?

A No, sir.

Q Did you talk to any policemen on the day of the 25th?

A No, sir.

Q Homer, what is your opinion—you have driven from Bulwar to City Hospital a number of times?

A Yes, sir.

Q You lived in the city of St. Louis how long?

A Off and on, all my life.

Q What time of the morning do you remember it was when you drove James down to the hospital?

[90] A I don't know exactly, but I believe it was somewhere around 8:00 o'clock.

Q Did it appear to be in the rush hour?

A Yes, sir.

Q How long would it take a normal person to get from Bulwar down to City Hospital driving normally?

A Fifteen to twenty minutes.

MR. WEISS: That's all.

THE COURT: Do you have any questions?

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Homer, the defendant here is your brother; isn't that correct?

A Half-brother.

Q Half-brother. Okay. You want to help him as much as you can, don't you?

A In a legal way.

Q In a legal way. That's why you are here today, isn't that so?

A Yes.

Q Now, did you attend any of the days of your brother's trial?

A No, sir.

Q The night before the shooting did you speak with your brother either in person or on the telephone?

A Yes, I spoke with him in person.

Q He told you he was coming over to the house, didn't he?

A Yes.

Q He told you how the trial was going, didn't he?

[91] A Yes.

MR. WILLIAMS: Nothing further.

MR. WEISS: Just a few more questions.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Homer, do you know Mr. Lester Watson?

A Briefly.

Q Briefly. How many times have you spoken to Mr. Watson before the trial?

A Before the trial? Never.

Q Never spoke to him. Did Mr. Watson ever call you?

A No. I left messages but he never did call.

Q Have you attempted to speak to Mr. Watson?

A Yes, sir.

Q Had you left messages at his office?

A Yes, sir.

Q Did he ever call you back?

A No, sir.

Q At the time James was shot, that morning, during that day, did you speak to Mr. Watson?

A No, sir.

Q Didn't Mr. Watson attempt to call you, to your knowledge?

MR. WILLIAMS: That's objected to.

A No.

MR. WEISS: That's all, Your Honor.

[92] MR. WILLIAMS: This whole business, the whole relationship between this witness and Mr. Watson would be totally irrelevant.

THE COURT: All right. The answer may stand. You may step down.

(Witness excused.)

JAMES McCLEARY, of lawful age, the witness called by the movant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q Mr. McCleary, state your full name, loud and clear, please.

A James McCleary.

Q Mr. McCleary, are you related in any way to James Drope?

A Ex-stepfather.

Q You were married to his mother at one time?

A Yes, sir.

Q Mr. McCleary, taking you back to the morning of July 25, 1969, at a time—we are talking about an incident where James Edward Drope was found outside his brother Homer's house, shot. Do you remember that morning?

A Yes, sir.

Q Did you see him laying out there that morning in the backyard?

A Yes, sir.

Q At that time was he able to speak to you?

[93] A No, sir.

Q Did you along with Homer Case transport him down to City Hospital Number 1?

A Yes, sir.

Q Along the way, did James Drope say anything to you?

A No, sir.

Q What was his condition? What did his physical condition to you appear as?

A He was shot.

Q When you got to the hospital, were you with him?

A Yes, sir.

Q Were you with him when they took him into the hospital?

A Yes, sir.

Q Were you with Homer Case also?

A Yes, sir.
Q Now, when you got to the hospital did anybody ask you to sign a piece of paper?
A The doctor.
Q A doctor asked you to sign something?
A Yes.
Q Was this the consent to have James operated on?
A Yes, sir.
Q Pardon?
A Yes, sir.
Q Okay. Now, at the hospital did you see any policemen talking to him?
A No, sir.
Q Did you see any policemen?
A No, sir.
Q Did any policeman talk to you?
A No, sir.
Q Did you talk to any policeman?
A No, sir.
[94] MR. WEISS: That's all the questions I have, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mr. McCleary, did you attend Mr. Drope's trial?
A I was there.
Q You were at the trial?
A I was there, yes.
Q The evening before the shooting, did you discuss the trial with the defendant?
A No, sir.
Q You didn't talk about the trial with him?
A No.
Q The next morning, the morning of the shooting, you went over to Mr. Case's house?
A Yes, sir.
Q Did you go there with anyone?
A No, sir.
Q You went to Mr. Case's house by yourself?
A Yes, sir.
Q You didn't go with your wife?

A No.

Q You didn't go with James Drope?

A I don't think so.

Q Pardon me? I didn't hear you, sir.

A I don't think so.

Q Would it refresh your recollection if I were to tell you that Homer Case testified that you, your wife and James Drope came there to his house together?

A No.

[95] Q You are just testifying here because you want to help James. Isn't that so?

MR. WEISS: I object to that, Your Honor. Of course he wants to help. That's why any witness testifies.

THE COURT: As to the form of the question the objection will be sustained.

Q Now, Mr. McCleary, the morning of June 25, did you know that there was a gun in the garage?

A I sure didn't.

Q Pardon me?

A No, sir.

Q You didn't know there was a gun in the garage?

A No, sir.

Q Did you see a gun that morning?

THE COURT: Speak up.

A Yes, sir.

Q Where did you see the gun?

A In the garage.

Q In the garage?

A Yes.

Q When was the first time you saw the gun in the garage?

A The only time I seen it.

Q What?

A That's the only time I seen it.

THE COURT. Speak up.

THE WITNESS: It's the only time I seen it.

Q Now, when for the first time that morning did you see your wife?

MR. WEISS: I think we want to make the record clear, [96] Your Honor. He was not married to James' mother at the time.

Q At the time of this event, were you married to James Drope's mother?

A No.

Q No? When, that morning, for the first time did you see James Drope's mother?

A I don't know.

Q You don't know?

MR. WEISS: Just answer the questions as you recall it, Mr. McCleary. Just answer it as you remember what happened that morning.

THE WITNESS: No, I don't.

Q You don't know. Now, the morning before that, had you gone to court with James Drope's mother?

A No, sir.

Q No? Do you remember testifying here earlier when I asked you whether or not you had gone to court in this case when it was on trial you said yes? Was his mother there?

A No, sir.

Q Pardon me?

A I don't remember.

Q You don't remember. But you do remember quite well that at the hospital, City Hospital Number 1, on that morning you did not see a policeman?

A No.

Q Did you see a policeman that afternoon?

A Later in the day.

Q Later that day you saw a policeman. Did the [97] policeman talk to you?

A No.

Q Did the policeman talk to anybody in your presence like James' brother?

A No.

Q Did she tell you that a policeman ever talked to her?

A No.

Q Do you know Lester Watson?

A Who?

Q I can't hear you.

A What did you say?

Q Do you know Lester Watson?

A Not that I know of.

Q You don't know him. On June 23, 1969, you did not know him that day, either, did you? I don't hear you, sir.

A I don't know.

Q On June 24, were you in attendance at James Drope's trial in this city?

A I went there.

Q You went there?

A Yes.

Q On that day was he represented by a lawyer? I don't hear you, sir.

A I don't know.

MR. WILLIAMS: Not that you know of. No further questions.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Mr. McCleary, let me just ask you a few questions. Just think about them and answer them truthfully and as you remember things. Don't be nervous. Okay? Now, did you come [98] to the house that morning with Mr. and Mrs. Dewey, over at Homer Case's? Did they pick you up and bring you over there?

A When?

Q On the morning that James was shot, did you come with Mr. and Mrs. Dewey and Jim over to Homer Cases' house? Do you remember? How did you get over there? Did you drive yourself?

A Bus.

Q Bus. You don't know Lester Watson, you don't know who we are talking about, do you?

A No.

Q When you were at the hospital on that day of the 25th, did you see some guards that look like policemen around the hospital? There were guards at the hospital, City Hospital?

A No, sir.

Q Well, now let me ask you this: Did you at any time see the policeman talking with James Drope while you were there?

A No.

Q No policeman talked to you as you recall?

A No, sir.

MR. WEISS: That's all the questions I have.

RECROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mr. McCleary, when you went over to that hospital they took James Drope into a room, didn't they, wheeled him [99] right into a room, didn't they?

A Yes.

Q Closed the door, didn't they?

A I don't remember.

Q You don't remember.

THE COURT: Now, let me ask you a question. Did any member of the family report that someone has shot him?

THE WITNESS: No.

THE COURT: Why?

THE WITNESS: I don't know.

THE COURT: All right. Let's proceed, gentlemen. This witness I don't know whether it is a mannerism, but he is very reluctant to answer any questions. He doesn't seem to know any more than he helped the man over to the hospital.

THE WITNESS: That's all I know.

MR. WILLIAMS: No further questions.

MR. WEISS: That's all the questions we have.

(Witness excused.)

THE COURT: All right. Do you have any more witnesses?

MR. WEISS: Yes. We have the defendant.

THE COURT: Well, how long will it take?

MR. WEISS: I have no idea, Your Honor. It won't take a long time with me. I don't know about what the cross-examination is going to be.

THE COURT: All right.

MR. WEISS: At this time, Your Honor, we would like [100] to call James Edward Drope to the stand.

JAMES EDWARD DROPE, of lawful age, the movant herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q State you full name, please.

A James Edward Drope, D-r-o-p-e.

Q Where are you residing right now, Jim?

A Right now, at the present time at the City Jail.

Q Before you were brought down from City Jail, where were you?

A Missouri State Penitentiary.

Q Are you serving up there under the conviction for the rape of Mary Ann Drope?

A Yes, sir.

Q What was your sentence in that case?

A Remainder of my natural life.

Q Jim, at that time do you recall an incident that happened wherein you were accused of raping Mary Ann Drope?

A I beg your pardon?

Q Do you recall the incident out of which you were accused of raping Mary Ann Drope?

A Well, all I really—all I can understand is what is in the transcript I have been able to study since this.

Q Do you recall the date on which this incident arose, sometime in January of 1969?

A Yes, sir.

[101] Q You were subsequently arrested by the police; is that right?

A Yes, sir.

Q Now, James, did you retain counsel to represent you on this charge, the defense of this charge?

A Did I retain an attorney?

Q Yes.

A Definitely not.

Q Who retained or did you have an attorney?

A I didn't retain no attorney until after I had made bond.

Q Did you have an attorney up until the time you made your bond?

A They say I had a court appointed attorney that talked to me, but he made no sense.

Q Do you recall what his name might have been?

A No, sir.

Q Do you recall what day you made bond?

A Seems to me like right around February 29th, I'm not sure.

Q For the last of February you made bond, up until that time, were you in jail?

A I was in City Jail for a while, then transferred to the City Workhouse.

Q You were confined up until the time you made bond, the last of February; is that correct?

[102] A That's right.

Q After you were released on bond, then did you obtain counsel?

A My mother by that time had obtained counsel for me.

Q Would you tell the Court the name of that counsel, please?

A Lester Watson.

Q Do you recall the first time you talked to Mr. Watson?

A Not right down to the date.

Q Were you still in jail?

A No.

Q You were out of jail the first time you talked to him?

A Yes.

Q Do you recall the approximate length of that first conversation you had with him?

A Approximately ten, fifteen minutes at the most.

Q Now, did you talk to him any other times personally, face to face, after that first time?

A Yes, sir.

Q When was that, do you recall?

A That was when he had me bring my wife out to see him, because my wife had told me to tell him that she wanted to see him.

Q You and Mary Ann then went out to see him?

A Yes, sir.

Q That was the second time you talked to him?

A Yes, sir.

Q How long did you spend out there at that time?

[103] A He talked to my wife for approximately thirty minutes.

Q Were you in the same room when he was talking to her?

A No.

Q You were in another room?

A Yes, sir.

Q You don't know what he said to her?

A No.

Q Did he talk to you alone or with Mary Ann?

A Just long enough to introduce her. When they come out together, then he wanted me. He told me that Mary Ann had suggested me go see this Dr. Shuman, wanted to know if I would consent.

Q So you went to see Dr. Shuman after this meeting?

A Yes, sir. I think it was approximately the following week, because I didn't have no money to give no doctor.

Q All right. Now, after seeing Mr. Watson on this second occasion and after your examination with Dr. Shuman, did you see Mr. Watson at any other time?

A Only to give him money. I tried to talk about the case with him. He said he'd take care of that later. We got plenty of time.

Q How much money did you personally give Mr. Watson, do you know?

A Let's see, in the neighborhood of around three, three fifty, something like that.

Q Three hundred and fifty dollars, maybe?

[104] A Approximately.

Q Was this all in cash?

A Yes, sir, except for one—I'll take it back. It was a payroll check. One of the companies I had been driving

for, they pay us daily because I was working out of the hiring hall and I just signed and gave it to him.

Q Now, Jim, did Mr. Watson ever call you, bring you in to talk about what happened on that night?

A Well, just very vaguely. Let's see, one trip I went out there and talked to him very vaguely. He said he wanted to get this report back from the doctor before he did discuss anything with me.

Q Did you suggest any witnesses that might testify in your behalf to him?

A Yes, sir. That morning there was a big squabble, because Your Honor here was upset over him not showing up. He was supposed to have known the hearing was that date. I found out by accident it was that day, through my father-in-law.

Q He didn't tell you that you were supposed to be on trial June the 23rd?

A I was informed in Judge Walsh's court that they had continued, gave me—granted me the continuance until September. The state was making arrangements for further psychiatric examinations and there was supposed to be a sanity hearing.

Q Who so informed you of that?

[105] A Beg your pardon?

Q Who informed you of that?

A Mr. Watson. I was sitting in the courtroom at the time, but when we got rushed into court well, I just didn't know what the heck was going on.

Q How many times do you think you talked to Mr. Watson from the time he was obtained to represent you until the time of trial?

A Not more than half a dozen times at the most.

Q Now, James, during that day of trial, the first day, June 23, were you able to talk to Mr. Watson other than for the sole purpose of him informing you that you were going to go to trial that day?

A I didn't quite catch that, sir.

Q Pardon me?

A I didn't quite catch your question.

Q Did you talk to Mr. Watson at all about your case

on June 23, except for the fact that he told you you probably wouldn't go to trial that day?

A Nothing other than that.

Q You weren't able to talk to him on June the 23rd at all?

A Your Honor here, Mr. McMullan I think his name is, him and the prosecuting attorney at the time were in some kind of hassle over improper motions and all this stuff. That's all I can say. I didn't quite understand [106] it either.

Q Did they at any time ask you to plead guilty?

A Yes, sir. I was asked at the back door of the courtroom, Division 19, I do believe, by Mr. Watson—Your honor here had—Mr. McMullan had stepped out of the courtroom with the prosecuting attorney and my attorney, and it was my impression that they went to the judge's chambers for a conference, for a recess they called it out in front of me, and when they returned, to the best of my knowledge, standing at the back door of the courtroom, this door right here, and he says, "I advise you to plead guilty to ten years, they're offering you ten years to plead guilty or they are going to throw the book at you." But I said, "Let them throw the book at me. I'm not guilty and can prove it. I'll have my witnesses here in the morning. You just see that you put them on the stand."

Q All right.

A I never saw Watson after that, to the best of my memory.

Q He talked to you that night after the trial?

A He came back to the back, he said, "I'll see you tomorrow."

Q See you tomorrow?

A Yes.

Q He didn't ask to talk to you about the trial or any witnesses or anything?

A No. He just told me [107] "Be sure to have them here." I said, "You just be sure to put them on the stand." I would have them there.

Q James, after you were convicted, were you given any type of psychiatric examination?

A Afterward?
Q Yes.
A That would have been after I got into City Jail?
Q Yes.
A No, sir, not to my knowledge.
Q You had seen Dr. Shuman in February; is that correct?
A I couldn't swear to the exact date, but it was February.
Q Did he give you some medication?
A Yes, sir.
Q Were you taking that medication?
A Yes, sir. I even had some right there in the courtroom, because I was so nervous I couldn't see straight and I couldn't make sense out of what they were talking about.
Q Did you take medication in the courtroom?
A Yes.
Q Was this the day before you shot yourself?
A I don't know whether I shot myself or not. I couldn't swear to that part, but I had been on medication all along. The doctor, the best I can recollect had told me not to take it unless I needed it.
Q After you were convicted in the penitentiary, Jim, did you ask Mr. Watson to appeal your conviction for you?
[108] A Yes, sir, I had, but this wasn't after I was in the penitentiary, this was right in the courtroom. He said he was going to appeal it. Well, he told me he would appeal it and I should be coming up, having a hearing in the Supreme Court in December, and then they carried it on until January. I had heard nothing through January, so I talked to some fellows up in the institution up there and I was advised to write to Marion Spicer, Supreme Court Clerk, and request this information and to find out if he had anything where I was the defendant on this docket. At that time, no. So I filed an untimely notice of appeal with the help of the C Hall clerk, which is the dorm I'm in, and I had filed this, an untimely notice of appeal, then we proceeded from there. They appointed Lester Watson to represent me again. I tried to take and get him off

the case, but I couldn't. I didn't find out until recently how to get a lawyer off the case.

Q Jim, you were present at the first day of trial when Mary Ann testified; is that correct?

A Yes, sir.

Q You went home that evening, got up the next morning, went over to Homer Case's house; is that correct?

A I left the courtroom—I beg your pardon. I left the courtroom.

Q Now, James, you went over the next morning; right?

A Yes.

[109] Q When you were over there, what do you remember happening?

A I remember playing with the kids and getting them up, the best I can remember. I took them, changing the baby's diaper—

Q You were changing the baby's diaper?

A I had all the children at my brother's house at that time, because my wife, you couldn't depend on her to take care of them while I was away from home, and my mother had stated to me that I better hurry up and get dressed, because I was going to be late for court. I said all right. I had to go to the basement to get my clothes and get the kids a change of clothes. Well, I went to the basement. I don't remember coming back out of that basement.

Q Do you remember being in City Hospital at all?

A No, sir.

Q Do you remember signing your name to any "consent to operation"?

A No, sir.

Q Do you remember talking to any doctors?

A No, sir.

Q Do you remember talking to any policemen?

A No, sir. Now, what I mean, that is pertaining to the City Hospital over on Lafayette, when I came to out here at Homer G. Phillips Hospital, I do believe it was on the second day of July, I thought it was the same day. I told them I had to get up, I had to get

my clothes on, I had to [110] get my clothes on and get in court.

Q You told them this?

A Yes, because I thought it was the same day. Then when I started to get up, then that's when I first really knew what had happened, you know. There was a policeman at the foot of the bed. He told me, he said, "You lay still. You'll tear them stitches off." "What stitches?" I got to feeling, you know, and he said that, "Well, man, you been shot."

Q This was over at Homer G. Phillips Hospital?

A Homer G. Phillips Hospital.

Q Some days after the time—

A This was in the month of July. In fact, it was the day before Lester Watson had come out to see me. They held me incommunicado out there. I wasn't allowed to see my people or anything. My mother, she got—supposed to be a court order from Mr. Watson—well, he let my mother see me one time, and then they pulled—they said, well, the court order was supposed to have been forged, because they wouldn't let my mother in to see me no more.

MR. WEISS: That's all the questions I have at this time, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mr. Drope, when you were first arrested in this case, do you remember that?

A I remember very [111] vaguely. What actually took place, I have no idea what proceedings I went through. They did not advise me of no constitutional rights or anything like that.

Q They didn't advise you of your constitutional rights?

A No. Which the officer stated on the stand he did.

Q How many times did you go to court in this case, do you remember?

A Offhand, I really couldn't tell you exactly.

Q You say your mother got Lester Watson as your lawyer?

A Yes, sir.

Q And he advised you to go out to see Dr. Shuman?

A Yes, and my wife.

Q You went out to see Dr. Shuman; isn't that correct?

A Yes, sir. My wife drove me out there to see this doctor.

Q And after you saw Dr. Shuman, did you speak with Lester Watson again?

A It was sometime after that. I had taken money out to give him, trying to do my best to take care of the family, which is hard to do, trying to pay a lawyer and a bondsman.

Q Do you remember that you did have a lawyer and you did have a bondsman?

A Yes, sir. It was through my bondsman I found out that they had rushed my trial up to June 23rd from September.

Q Were you present in court on May 27th of 1969? [112] A Yes. It seems like, I think, it was Division 16.

Q Where do you think that was?

A In Judge Walsh's court.

Q In Division 16?

A I'm not positive.

Q Was Lester Watson with you that day?

A He wasn't there at the present time. I had to wait and wait and finally he got mad and he went back and talked to somebody, I don't know, judge, the prosecuting attorney or whoever he was, but I know it was Judge Walsh's court.

Q On that day you were out in open court, isn't that so?

A Yes.

Q Did you speak with Lester Watson after leaving court that day?

A No. He said that he would call me later. They were going to take and make arrangements for me to see a psychiatrist and that the trial would be continued to September.

Q Well, didn't they announce in court that very day, on May 27th, that the next date would be June 23rd,

and that the motion for the psychiatric examination had been overruled?

A I really don't know.

Q You didn't hear that?

A No.

Q Now, earlier you, in testifying to counsel's questions, you said that the prosecutor and Lester Watson [113] and the Court was in an argument and the Court said that the motion was improper?

A They had come to the conclusion that it was filed in improper form. No fault of mine. I'm no lawyer.

Q It was improper?

A Well, that's what your lawyer here stated.

Q And therefore the case would not go over to September, but you would go to trial on June 23rd.

A Well, the Judge here, he stated to the lawyer, the best I can recall, that he should submit this form, you know, properly, and that he had had sufficient time to do so. Now, I don't know when he had to submit it or anything. I don't know just what the scuttlebutt was.

THE COURT: You keep pointing at me. That was 16. Was that Judge Walsh?

THE WITNESS: Judge Walsh's court.

THE COURT: You are talking about two different situations. You are talking about when you were in 16 and when the case was continued.

MR. WILLIAMS: That's about the motion.

THE WITNESS: I'm talking—

THE COURT: Just a minute.

MR. WILLIAMS: He was recalling what happened on a motion.

THE COURT: What motion?

[114] MR. WILLIAMS: In 16.

THE WITNESS: This was in this man's court, this fella's here.

THE COURT: That's what I am trying to tell you, counsel, if you will listen, that he is talking about me and you are talking about Judge Walsh.

Q You recall being in Judge Walsh's court?

A Yes, sir.

Q Do you recall Judge Walsh saying something about the motion being improper?

A No, sir.

Q You don't recall that?

A No, sir.

THE COURT: Not Walsh, but this Judge.

Q I see. How did you come to court on June 23rd, do you remember?

A Yes, sir. I had had, I had went downtown to my in-laws, give my clothes for my babies and some for myself, I didn't have any more clean to wear to work, and the kids didn't have any more, so I went down there and I was talking to John Devoso, Mary Ann's stepfather who at the time was my stepfather-in-law, and he said he had to go to court tomorrow. I said, "What have you done to have to go to court?" And he said, "Well, it's on this mess with Mary Ann." I said "Yes". He said "Well, haven't you been notified?" I said, "No." And so I called my lawyer. I can't reach him. So I called my bondsman. I asked him to check into this, and so he said, "Well, meet me down there." [115] I said, "I hate to lose the work, because I need the money." He said, "Well, just in case they have set it up on you. According to my records you're not supposed to be up until September." He said, "But just in case, wait downstairs. I'll meet you down there and let you know." That's when he come down and told me that they were going to start the trial.

Q Well, you do recall being in court on May 27th, in Judge Walsh's court?

A Yes. I was there with my stepfather.

Q Right. Now, do you recall the trial starting?

A On June 23rd.

Q You recall June 24th?

A Very little of June 24th, up until the time I went to get the—change the clothes.

Q When did the shooting take place? Do you know that?

A Well, to the best of my knowledge, it happened in the basement. I had woke my baby brother up and sent him upstairs. My brother told me to have—to get him up and come on up because he was supposed to help my sister-in-law take care of the kids that day, while I was at court, you know. So I got up, went upstairs and I was getting my clothes together, getting ready to clean up, change the kids, before I went into court that

day, and I wrenched around, the best I remember, I turned around and turn the light off. When I turned around something hit me in the stomach and I [116] pulled away and I had a hot, burning sensation going through my stomach. That's the last I remember until I woke up in Homer G. Phillips Hospital.

Q Do you remember any testimony in your case?

A Only very, very vaguely. Some my wife said that set me off, because my lawyer was sitting right there with me. I already told him some of the things that she said on the stand were just an outright lie and we could prove it.

Q So you were able to discern what was going on when the witnesses were testifying and you told your lawyer?

A That was the only witness that got on the stand that I can recall that said anything that I could make any sense out of.

Q Do you remember testifying here today, saying that a police officer testified that he had told you what your rights were, but you said he didn't tell you?

A That he didn't tell me. That's what I'm trying to tell you. This was all right there with Mary Ann.

Q But you remember that this officer did testify to that?

A Yes.

Q Did anyone else testify, that you recall?

A It seems to me like there was Mary Ann and the police officer. I couldn't swear to the rest of them, but it seems like there were some others.

Q Mary Ann was the chief witness, wasn't she?

[117] A Yes.

Q And she sat and pointed you out as being one of the persons that raped and sodomized her, didn't she?

A I don't think she pointed me out. She said, yes, sir, that I was her husband, James Drope, the best I can recall.

Q The best you can recall?

A I don't know, I don't recall exactly how it was said, but this, I think, is what I read in the transcript in order to try to refresh it.

Q Do you remember the name of Tuttle?
A Who?
Q Tuttle, Rayborn Tuttle.
A I don't recall hearing this there.
Q Do you know him?
A Rayburn Tuttle, I have know him ever since he was a baby.
Q Did you know Roger Butler?
A Yes, sir. I've known him about nine, ten years. They was all the time bringing cars over to the house for me to help them work on.
Q Did you hear your wife testify that you and they came to the house and you pointed a gun at her and knife at her and all of you raped and sodomized her?
A I remember all of this from just reading back over this transcript. Now, I have been going over it ever since I was able to obtain it. All I know is just what is—just what I read about it. Really, when it comes right down to it, [118] I still ain't got no clear picture of it.
Q When you were arrested the first time, back in January, did you know why you were being arrested?
A They didn't state why I was being arrested.
Q They didn't tell you that you were being arrested for rape?
A No. I never was told that I was arrested.
Q You remember coming to court, the three C's court?
A Yes. I remember going back to see the judge, I remember being transferred from the jail to the workhouse.
Q Did anyone ever tell you why you were coming to court?
A It was read off when I came into court. They had five different charges, so they said. I don't know.
Q And these charges involved your wife, did they not?
A Yes.
Q Do you remember that?
A Well, I remember what they read off.

Q You remember what they were read off. Do you remember going with your wife to Lester Watson's office?

A My wife had, see, my attorney like I stated before, my attorney had said that he would like to see her, so I took her with me to see him.

Q At that time wasn't it for the purpose of her signing an affidavit to the effect that she would not prosecute you for this crime?

[119] A She had mentioned it, that she didn't want to prosecute, yes, many times. In fact, the day I got out of the workhouse she came to my mother's house and asked me to come on back home, to forget it. The only thing she was interested in was trying to take and get along, for us to try and make a home for our children.

Q So then you did know why you were coming to court, didn't you?

A I knew what I was charged with, yes, after I had been in court for the arraignment.

Q And after you mother obtained Lester Watson for you, he told you what you were charged with, didn't he? He told you what you were charged with, didn't he?

A He only mentioned one—one charge. It was for being charged with forcible rape.

Q That's what you were charged with, that's what you went to trial on; wasn't that so?

A They said they was trying me for aiding and abetting the commission of a crime. Not forcible rape.

Q Do you recall how Buttle and Butler were involved in this thing?

A Beg your pardon?

Q Do you recall how Tuttle and Butler were involved in this?

A Do I recall how they were involved?

Q Yes.

A We were all out drinking in the back yard of my house at the time that I was living at 79—1607 Hickory Street. When we moved there, after the [120] house was damaged, the police asked me to keep a close eye on it, see that it stays nailed up.

THE COURT: It's after 1:00. Is this going to take all day?

MR. WILLIAMS: I am just about finished, Judge.

THE WITNESS: And so I had gone to the grocery store by my house, I went and got the groceries, went on down and checked the house. While I was there I went over and started drinking again at the tavern, beer and whiskey, and came back to the car and—

THE COURT: Keep your voice up.

THE WITNESS: I got beer and whiskey and took it out and—what was the question again?

Q You were in the backyard drinking with these two men?

A They came to the car later, you know. I sat there for quite some time, they came up and bummed me for a drink. I said I haven't got any money to buy some more. If you drink my beer, buy some more. This was, I guess, around 7:00 somewhere. This just continued long after the taverns closed. We decided we'd go to East St. Louis, but I had to take my groceries first.

Q You brought them along with you home?

A Yes, sir. We were supposed to proceed on over to East St. Louis after I took my groceries home.

MR. WEISS: Your Honor, I would like to object to [121] any further testimony along these lines. We are not here to try him over again for the crime. We are merely here to determine whether he was competent at the time of trial.

THE COURT: Sustained.

MR. WILLIAMS: Pardon me, Your Honor.

THE COURT: I sustain the objection.

MR. WILLIAMS: I wasn't going any further along this line, anyway, Judge.

Q Mr. Drope, these papers that bring you before the Court today, did you prepare them yourself?

A Not solely by myself.

Q Pardon me?

A There is a party who helps me do all of the research and everything on this. In fact, two of them. Most of the typing I have done, that I could. If the

court wishes their names, I'll gladly subpoena them in here.

Q No. I was just wondering whether you did it all yourself. Are you receiving now any medication from the hosiptal up there?

A When I get nervous I do get medicine from the hospital.

Q When was the last time you took any medicine?

A Night before last.

Q You don't feel nervous today, do you?

A Yes, sir.

[122] Q Pardon me? Well, are you usually as composed as you are today?

A Beg your pardon?

Q Without taking medicine?

A What?

Q Are you usually as composed as you are today without taking medicine? You haven't had any medicine today, have you?

A Nothing but aspirins.

Q Nothing but aspirins. I have no further questions.

THE COURT: Do you have any further questions?

MR. WEISS: A few questions, Your Honor. Bear with me just for a minute.

THE COURT: I'm not trying to rush you, but it is 1:15. If you are going to take long, we'd better have a noon recess.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Jim, a transcript, a copy of the transcript you sent to me; is that right?

A Yes, sir.

Q And since you have been in prison, how long have you had this transcript?

A Not too awfully long.

Q How long?

A Not too long. After the attorney had filed, Lester Watson had filed he—

Q You had it for a year?

A I couldn't really say it was a year.

Q How many times do you think you have read it?
A I have read it from cover to cover, I guess, eight, [123] ten times.
Q Okay. Since the time, between the time this incident occurred, out of which you were charged, the rape of Mary Ann, between that time and the time of your trial, did you live with Mary Ann at any time?
A Yes, sir. We never was apart more than a couple of days.
Q Did you live back in the house you lived in before this incident took place for which you were charged?
A Are you referring to the one on St. Vincent?
Q Wherever your home was.
A We moved. After I got out of the workhouse, she came down and begged and pleaded with me to come back to her, that she would forget it all. Well, I went back and we moved the stuff out, my brother and I, Homer Case and Donald G. McCleary, and I'm pretty sure there was another party helping us. We moved all of the stuff to 7918 South Broadway.
THE COURT: Pardon me. What all this have to do with this?
MR. WEISS: I just wanted to establish the fact that he did live with Mary Ann after this incident took place. He was cross-examined—
THE COURT: All right.
Q Between the time you were charged with this incident we are talking about, the rape of Mary Ann, and the [124] time of your trial, had you gone out to Malcolm Bliss at any time for treatments?
A Yes, sir. I didn't have any money to buy the medication, so I went—like Dr. Shuman had advised me, to go down there. They had better, more qualified physicians to take care of it.
Q How many trips do you think you made down to Malcolm Bliss between the time you saw Dr. Shuman and the time of the trial?
A Sir, really, I couldn't say.
Q More than once?
A Yes, it was more than once.
Q Less than five?

A I couldn't swear to it.

Q Did Lester Watson ever discuss a plea of insanity with you?

A Beg your pardon?

Q Did Lester Watson ever discuss a plea of insanity with you?

A No, sir.

THE COURT: Was there any treatment shown in the hospital record just prior to this trial?

MR. WEISS: At the hospital?

THE COURT: Yes.

MR. WEISS: No, Your Honor. That's all the questions I have at this time.

THE COURT: All right. Do you have any questions?

MR. WILLIAMS: No. No, Your Honor.

[125] THE COURT: All right. You may step down.

(Witness excused)

MR. WEISS: Your Honor, before we close this hearing today, there were two witnesses that I intended to call for this hearing. One was Lester Watson, who has been ill for the past several months, who is confined to home and who could not be present here today, and also I planned to call Mrs. Frankie Dewey, who, according to the police reports, testified on the motion for a new trial in this case. It was alleged that she had reported the incident or at least discussed the shooting incident and I wanted her to testify to clear this up. She has had a heart attack within the last two weeks and is confined to bed and could not be here also. I wonder if I could have leave of the Court, with the permission of the prosecutor—he doesn't have to give me that, but to take her deposition and Mr. Watson's, rather than recess or continue this hearing and have them take the stand.

THE COURT: That seems reasonable.

MR. WILLIAMS: Well, Your Honor, if they are unable to appear—

THE COURT: We will mark it partially heard and past for the purpose of permitting counsel for movant to take depositions which will be submitted to the Court after they are taken.

[126] MR. WEISS: I would also like permission from Your Honor to file a brief and have about thirty days to file.

THE COURT: Well, when you file the depositions, if at that time you request some time for filing a brief it will be granted.

MR. WEISS: Thank you very much, Your Honor.

MR. WILLIAMS: At this time I would like to move that the Court take judicial notice of the other file in the official court transcript of the trial.

THE COURT: Well, the transcript of the trial proceedings will be considered as in evidence.

MR. WEISS: I would like that very much, Your Honor.

THE COURT: All right. Also the report of Dr. Shuman; is that correct, gentlemen?

MR. WILLIAMS: Right.

MR. WEISS: Yes, Your Honor.

THE COURT: And also the minutes of the clerk's office in the original file ought to be in evidence. That is in Cause No. 405 R, to show the time these incidents occurred, requests for continuance and stuff like that.

MR. WEISS: I think that is correct.

THE COURT: And also the testimony that was taken after the motion for a new trial was filed with reference to the voluntariness or involuntariness of defendant being in [127] court; is that correct?

MR. WEISS: I think that is a part of the transcript.

MR. WILLIAMS: Of course, I ask that the Court take judicial notice, and I think counsel asked earlier, of the decision of the Supreme Court in this case.

THE COURT: I think that will be part of the record.

MR. WEISS: The records of the City Hospital, could we withdraw them and keep them in the custody of the City Hospital Record Librarian, Norma Snowden, in case on appeal we would need them.

THE COURT: Yes. The Court will be adjourned until tomorrow morning.

(Hearing concluded.)

* * * *

[Caption and signature omitted in printing]

STATEMENT OF FACTS, CONCLUSIONS OF LAW AND ORDER

MCMULLAN, *Judge*:

The movant, James Edward Drope, filed his Motion to Vacate Judgment and Sentence pursuant to Supreme Court Rule 27.26 to set aside a life sentence which was imposed after a trial by jury on October 21, 1969. The movant was charged with two others with rape and one co-defendant pled guilty and movant here and one other were tried separately and each found guilty of rape.

The judgment against movant, hereinafter referred to as Mr. Drope, was affirmed by the Missouri Supreme Court in the case of *State* v. *Drope*, 422 SW 2d 677 and for additional facts reference is made to that decision.

It is contended by movant that:

1) he was entitled to a psychiatric examination to determine his competency to be tried, convicted and sentenced and

2) that he failed to receive effective assistance of counsel and

3) his constitutional rights were violated by the failure to order a psychiatric examination and by conducting the trial and receiving the verdict in movant's absence.

Lester Watson, an attorney, was retained for and on behalf of the defendant and entered his appearance as the attorney for the defendant Drope and handled the case from arraignment to its conclusion. After an interview and consultation with both his client, Mr. Drope, and his wife, the prosecuting witness, Mr. Watson arranged for a psychiatric evaluation by Dr. Joseph S. Schuman a report of which psychiatric evaluation was dated February 22nd and is in evidence. The record shows that the case was set for April 26, 1969 and continued as to all defendants to Monday, May 26, 1969 and the record further shows that following a motion for a continuance, which was filed on May 27, 1969 the case was continued on May 29, 1969 for the defendant to

June 23, 1969. On May 27, 1969 the defendant's counsel filed the following motion:

MOTION FOR CONTINUANCE

> Comes now the defendant, JAMES E. DROPE, and states to the court that he has had a psychiatric examination made by Dr. Joseph F. Shuman, M.D., a copy of which report is attached hereto.
>
> Defendant moves the court to continue his case until September, 1969 in order that he might receive an examination, evaluation and psychiatric treatment, as suggested by Dr. Schuman, at the Malcolm Bliss Hospital in the City of St. Louis, Missouri.'

On Monday, June 23, 1969 the case was assigned from the assignment division to division number 19 for trial and over the objection of defense counsel the case proceeded to trial. The record shows that the attorney for the defendant after the cause was docketed, called and assigned to Division 19 for trial did orally request a psychiatric examination in that he stated orally 'I am objecting to going to trial with this defendant also for the reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial.' The trial began on June 23, 1969 and was concluded June 25, 1969, the jury finding the defendant guilty. The defendant was present in Court during the proceedings of June 23 and June 24 but on the morning of June 25 the defendant did not appear and the minutes show the Court was informed that the defendant was in the hospital as the result of a self-inflicted gunshot wound. Actually, the Judge ordered the Circuit Attorney to verify this information. The trial thereafter proceeded without the presence of the defendant.

The motion for a new trial was overruled after a hearing at which evidence was heard upon the question of whether or not the defendant's absence was due to his own voluntary act for the purpose of avoiding trial. After the hearing on the motion for a new trial the Court filed the following memorandum and ruling:

"The only point made in defendant's memorandum in support of his motion for a new trial is the failure of the record to show 'any reasons for defendant's absence during a portion of the trial'.

The defendant was on hand and present during the first and second day of trial and when the court adjourned to June 25th, 1969, for further proceedings. The defendant failed to appear on June 25th, and the court after an hour's wait proceeded with the trial. The information the court received over the phone and which was checked by the Circuit Attorney's Office through the Police Department with the hospital may not appear in the trial proceedings, but it seems ridiculous to urge that the State or the Court should be required to prove that defendant's absence was voluntary. Neither the State nor the Court should be required to play hide-and-seek with the defendant. Common sense dictates that the burden is on the defendant to show his absence was not voluntary; any other rule places the control of the progress of the case in the hands of the defendant and could well lead to bizarre situations and disrespect for the Court.

However, the whole matter *is* in the record. The defendant was the movant in making a record of the cause of his absence at the hearing on the motion for a new trial. The Court finds from the evidence that the absence of the defendant was due to his own voluntary act in shooting himself; done for the very purpose of avoiding trial. In this type of case where the victim suffers an ordeal in testifying, it is all the more necessary for the Court to carefully scrutinize the defendant's conduct in causing his absence from the trial of the case. The victim in this case faced the prospect of testifying to the revolting conduct of four more persons charged with rape as a result of this occurrence.

The Court has reviewed the instructions and the testimony and finds no error in the trial or any reason why the motion for a new trial should be sustained.

THEREFORE, it is ordered and adjudged that the motion for a new trial, having been heard and submitted and considered by the Court, is hereby overruled, and sentencing is set for Tuesday, October 21st, at 9:15 A.M."

It is now contended that Mr. Drope was

1) entitled to a psychiatric examination to determine his competency to be tried, convicted and sentenced;

2) failed to receive effective assistance of counsel; and

3) his constitutional rights to a fair trial and due process were abridged by the failure to order a psychiatric examination and by conducting the trial and receiving the verdict in movant's absence. As to point again urged that the Court proceeded with the trial in the absence of the defendant this matter has been decided by the Supreme Court in its opinion in this case.

A close analysis of the transcript shows that there was no contention before, during or in after trial motions or hearings that defendant did not have the mental capacity to proceed with trial. And as pointed out in the Supreme Court opinion there was no contention on appeal that the defendant did not have the mental capacity to proceed with trial.

Attached to the motion for a continuance was a psychiatric report from Dr. Joseph Schuman which showed that Mr. Drope had been working out of the union hiring hall for trucks and that he was diagnosed as a:

1) Sociopathic personality disorder, sexual perversion.

2) Borderline mental deficiency.

3) Chronic anxiety reaction with depression. It is also to be noted that at the time of his examination by Dr. Schuman, Mr. Drope was well oriented in all spheres and was able without trouble to answer questions testing judgment and that Dr. Schuman did not find any strong signs of psychosis at the time of the examination. The sexual perversion was apparently a part of Mr. Drope's own culture. All this falls far short of indicating that Mr. Drope lacked capacity in the understanding of the nature of the proceedings against him or was not

able to cooperate with counsel. In fact, it may be said that the report of Dr. Schuman indicated quite the contrary. While counsel for defendant at the time of the trial contended that the defendant was not a person of sound mind and should have further psychiatric examination before his client should be forced to trial there is no statement in the transcript nor any showing that Attorney Watson contended that his client lacked the ability to consult with him or did not understand the proceedings.

While the defendant was a truck driver and worked consistently for long periods of time before January 17, 1969 and as his wife testified he worked "half the time" and she denied any knowledge of his loss of the job due to nervousness. She did testify in answer to the question "And at that time didn't you tell me that you felt your husband was sick and needed psychiatric care?" the answer "Yes". There was also some evidence of disputes and trouble accompanied by some physical force between husband and wife but not to the extent to indicate inability to understand the proceedings. There was no recitation of facts upon which a layman could base the opinion that the defendant was insane except the testimony perhaps that he had rolled down the steps but this occurred only two or three times over a period of eight or nine or ten years. Apparently the only thing the Doctor told the wife was that the defendant had some problems and one would suppose in all reason this was not "news" to her. The testimony of the movant on the hearing on his motion under Supreme Court Rule 27.26 as to his observation of the trial showed that he was quite cognizant of the proceedings. There was no showing that Mr. Drope, on June 23 and June 24 acted in any manner that would cause the Court to have reason to believe he lacked capacity to understand the nature of the proceedings against him or to cooperate with counsel.

There was no previous conduct or history brought to the trial court's attention that would lead the court to believe that the defendant lacked such capacity. According to the testimony of defendant's wife, Mr. Drope

worked as a union truck driver and she did not recite peculiar acts or misconduct nor did the attorney for the defendant call to the attention of the court any such acts or misconduct that would cause the court to believe that he did not understand what was going on. There was testimony that she told the Doctor of some very unusual sex acts. One can not say they would indicate a lack of mental capacity to understand the proceedings.

Mr. Watson arranged for a psychiatric examination of his client with Dr. Schuman and interviewed the prosecuting witnesses in his office. Mr. Watson showed a familiarity with the provisions of Section 552 of the Revised Statutes of Missouri as shown by the transcript of the record. If Mr. Watson failed to produce evidence on behalf of his client it is not pointed out what it is. His client by his own voluntary act made it impossible for Mr. Watson to place him on the stand to testify in his own behalf.

The movant testified that he told Mr. Watson that he would produce witnesses at the appropriate time. He gave no names of witnesses to Mr. Watson and even in the hearing on the motion filed under Supreme Court Rule 27.26 failed to reveal persons who could testify in his behalf. If Mr. Watson failed to raise a defense it is not pointed out what it was. Apparently, Mr. Watson was satisfied that the defendant did not meet the test that comes within the provision of mental insanity as outlined in Section 552, R.S. Mo. 1969. The mere fact that he stated that his client was mentally sick is no evidence that Mr. Drope was mentally sick. It has been the experience of the trial courts here that motions for psychiatric examinations have often been made merely for the purpose of delay. It is estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent.

At the hearing of the motion under Supreme Court Rule 27.26 the movant produced Dr. Joseph Schuman, a psychiatrist who had examined Mr. Drope before trial and whose report is referred to above. Dr. Schuman testified that it is a *possibility* an act of attempted suicide would be reasonable cause to believe that one

might not be mentally competent at the time to understand proceedings about him. He further testified that although he knew Mr. Drope was sent by his lawyer and was charged with the rape of his wife and had knowledge of the trouble that Mr. Drope was in, yet no where in the report did he state the man could not understand court proceedings or aid counsel. The Court finds that Dr. Schuman's testimony with reference to whether or not a Court would be given reasonable cause to believe that Mr. Drope was unable to cooperate with counsel or understand the proceedings was speculative and based merely on possiblities.

Dr. Jon Tek Lum, a psychiatrist, testified that taking into consideration the crime charged and the attempted suicide such a person is in need of at least a psychiatric evaluation to find out his mental condition. The Doctor could not really state whether he needed psychiatric care. He thinks if a man makes a suicide attempt on his life "this is a very serious psychiatric *indication* that the man has a problem and needs to consult with a psychitarist." The Court can not resist the comment at this time that it does not take a psychiatrist to know that such a man has a problem and indicates poor judgment. The commission of the act of which the defendant was proven guilty indicated this. And it can be said to apply to unprovoked attacks on another person. Dr. Lum did not really say that an attempted suicide was reasonable cause to believe that the accused had a mental disease or defect excluding fitness to proceed. At most he stated that "an evaluation was indicated and that a lot of things have to come in, be brought up in an examination to find out whether he is sane, malingering or did it intentionally or if it was due to a true psychiatric disorder."

The movant, Mr. Drope, told how he conversed with his attorney, Mr. Watson (half a dozen times at most), who prevailed upon his wife to come to Mr. Watson's office for an interview and obtain from her a statement to the effect that she did not want to prosecute Mr. Drope. The evidence did show that Mr. Watson conversed with his client, talked to the prosecuting wit-

ness, arranged a psychiatric examination and participated actively in the trial and cross examined vigorously.

Mr. Drope remembered much of what went on at the time of the trial. He claims that he told his attorney that "I will have my witnesses here in the morning. You just see that you put them on the stand."

Mr. Watson was not called as a witness and hence the Court is not advised that he had any basis to believe Mr. Drope was unable to cooperate with him and was mentally diseased or defective within the meaning of Section 552.030 or Section 552.020.

At the end of the hearing counsel for movant advised that he intended to take the deposition of Lester Watson and a Mrs. Franklin Dewey but this was not done.

Conclusions of Law

The case of *Rhafy* v. *White*, 383 Fed. 2d 883, is cited by movant and it is to be noted that during the course of the trial WHITE sat rigid as though "he just was not there." One of his attorneys testified that communication between them had been difficult. There was need of numerous special recesses because of WHITE'S condition. A psychiatrist who was present at the trial testified that WHITE was "barely in control" and was "very close to a psychotic break". WHITE had a long history of mental disturbances with repeated outbursts of violence and many strange incidents of behavior.

In the case of *State* v. *Machavy*, 478 Pacific (2) 787, both the prosecuting attorney and the defense counsel requested a competency hearing and MAHAVY'S conduct before, during and after both trials was sufficient to create a doubt concerning his capacity to understand his peril and to *rationally assist* his trial counsel. No such evidence has been presented here.

Hansford v. *U.S.*, 363 Fed. 2d 920, the defendant was, during the course of the trial under the influence of narcotics which often produces acute brain syndrome resulting in impairment of orientation, impairment of memory and impairment of all intellectual functions.

In *Jacobs* v. *U.S.*, 350 Fed. 2d 971, the defendant pled guilty and at the post-conviction hearing lay witnesses testified to observations which led the Court to order an examination by an independent psychiatrist and if it was determined that the defendant was mentally competent to stand trial on date he pled guilty the conviction was to stand, otherwise to be set aside.

In *Negron* v. *New York*, 434 Fed. 2d 386, the defendant neither spoke nor understood any English and his Court appointed counsel spoke no Spanish which was the language understood by NEGRON. The Court said "It is equally imperative that every criminal defendant possesses 'sufficient present ability to consult with his lawyer within a reasonable degree of rational understanding'." The Court held that he had a right to a competent translator.

In *Carroll* v. *BETO*, 421 Fed. 2d 1065, the defendant had a history of being in the Army and threatened to kill officers and attacked some of them. He had been diagnosed as schizophremia recurrent. He had been placed in shackles and had killed his wife and stepdaughter by cutting their heads off with a butcher knife and had pled guilty nineteen days after the murder and on his admission to the prison was diagnosed schizophrenia, paranoid type.

In *Clonch* v. *Boles*, 419 Fed. 2d 393, a nineteen year old boy pled guilty to rape and received a life sentence. The presiding judge was quoted as saying "This is a pitiful case. I have had this boy examined by two competent physicians and there is no question he is mentally defective * * * an asylum would be the proper place for this boy * * * we have no method of taking care of such cases."

In *U.S.* v. *Silva*, 418 Fed. 2d 328, a nineteen Puerto Rican was convicted of robbery and a confession (which he denied) was introduced into evidence. At a hearing to determine the voluntariness of the confession it was disclosed that within a few days after his arrival at the federal house of detention he swallowed several articles "including a razor blade and pieces of bed springs or bed spring connectors" and he had previously under

gone treatment at various hospitals for psychiatric disorder. He had suffered hallucinations and had made several attempts to commit suicide and a proper motion for a psychiatric examination had been denied.

In *Taylor* v. *U.S.*, 282 Fed. Supp. 166, the trial court denied the post-conviction motion without even a hearing where ther were grounds asserted of mental incompetence which was documented by nine exhibits which described the defendant as "mentally incompetent, agitated state of depression, manifest paranoid, delusions and schizophrenic reaction alcoholic type."

In *Dusky* v. *U.S.*, 362 U.S. 402, the facts were not set out. The upper court agreed with the Solicitor General that "The record in this case does not sufficiently support the findings of competency to stand trial."

In *State* v. *Davis*, 480 Pacific 2d 354, the court was informed in a pre-sentence report that the defendant had an I.Q. of about 60 and had attended a school for mentally retarded and had been a patient at the State Hospital on five different occasions and there was a report that the defendant did not belong in the Arizona State Prison due to his mental deficiency.

The general principle that must guide the court is set out very well in the section in the case of *Brizendine* v. *Swenson*, 302 Fed. Supp. 1011, and need not be again stated here. Suffice it to say that the authorities cited by the movant present stronger evidentiary basis than is present in the case at bar.

Counsel for movant in his very excellent brief states that all of the parties: the defendant, the State and the Court understood that defendant was requesting a psychiatric examination. Actually, the motion states the defendant had a psychiatric examination. Counsel may not be aware of the practice of the Circuit Attorney at the time to consent in all cases to a psychiatric examination whether with or without merit and without looking into the matter further. The record is abundantly clear that the Court did not treat the motion as one requesting a psychiatric examination. In fact, Mr. Watson was told if he seriously contended that his client was mentally incompetent he should file a proper motion.

It is stated in the brief of movant that defendant's counsel was not notified that the movant's case was set down on the trial docket for June 23, 1969. The defendant himself informed the Court that he was to meet Mr. Watson in Court that Monday morning, June 23, 1969. The record shows that on May 29, 1969 a minute entry was made "continued for defendant to June 23, 1969." All trial dockets of the Circuit Court are published and this was sufficient notice. *McGinley* v. *McGinley*, 170 S.W. 2d 938. While Mr. Watson in an effort to get a continuance contended that he did not know the case was set for June 23rd, the Court did not believe he was unaware of the setting. Mr. Watson's mere statement that he did not prepare this case for trial is one so often heard when counsel seeks a delay.

Movant's counsel in his brief states that the Court without any hearing or inquiry proceeded without movant on hearsay that movant had shot himself. The defendant's own counsel so informed the Court. It can be plainly seen by the testimony taken at the hearing on the motion for a new trial that the Court directed the Circuit Attorney through the Police Department to vertify the information supplied by counsel for the defendant.

When Dr. Jon Tek Lum testified in effect that the Circuit Court did not disagree or enter findings different from his conclusions, it would perhaps be more accurate to state that the Circuit Attorney's Office accepted his conclusion of record and therefore the Court entered its order as required in Section 552.030, 552.020. The Court is also cognizant of the fact that the psychiatrist at the State institution located in the City of St. Louis complained they can not understand why some of these defendants are sent by the Court because there is nothing wrong with them and it is a waste of hospital space and the taxpayers money.

Counsel for movant takes the position that the two psychiatrists both testified in their opinion there was sufficient evidence at the trial to cause the Judge to have reasonable cause to believe that the accused had a mental disease or defect excluding fitness to proceed.

A close analysis of the testimony of the two psychiatrists permits no such conclusion.

The psychiatric examination of Dr. Schuman did not supply the Court with reasonable cause to believe the accused "as a result of mental disease or defect lacked capacity to understand the proceedings against him or to assist in his own defense". Mr. Drope was orientated in all spheres. There was no evidence that he was unwilling to cooperate with counsel. There is no credible evidence that he was unable to follow the evidence at the trial or the described events connected with the alleged crime. His statment to police, his testimony and conduct on the motion for a new trial and his conduct and testimony on the present motion all indicate an understanding in spite of his self-serving statement of loss of memory of the time he shot himself. No member of his family was brought forth to show acts and conduct indicating a lack of understanding.

Mr. Drope has not testified that he attempted "to end it all". According to his testimony he was not aware of the situation under which he came to be wounded. The Court does not believe him. The Court made its findings and entered them at the hearing on the motion for a new trial and no evidence has been produced to cause the Court to change that finding and conclusion. It is well known that many persons score low I.Q.'s when examined on historical events, current events, mathematical calculations and other subjects requiring some reading but in the conduct of their lives and within their culture, environment and associations, such persons are not mentally deficient but in some instances, very sharp. Some persons are raised with sexual misbehavior and such acts become a part of the culture, to use the vernacular, it becomes "the fun thing to do". The fact that Mr. Drope shot himself to avoid trial suggests very strongly an awareness of what was going on. He had heard his wife testify to the facts of the crime and had heard two witnesses testify to his admissions and hence was very much aware of, not only the proceedings, but what he had done and the probable consequences. A person does not defend himself against that

which he is not aware of or does not know of. His shooting himself was to avoid the consequences.

In the case of *Pate* v. *Robinson*, 383 U.S. 379, 14 L.ed. 815, Robinson was convicted in 1959 and had a long history of disturbed, violent and peculiar behavior. He was admitted to a hospital in 1952 imagining that he heard noises, saw things, animals, snails, elephants, and this lasted for about two days. Voices threatened him "They are trying to shoot him:. After release from the state hospital Robinson had errational episodes, became more serious and his conduct was such that the police were called to lock him up. He pranced about staring wildly. In 1953 he shot his 18 month old son and shot himself and jumped into a lake. After serving almost four years in prison for killing his son he was released in 1956. He lived with one Flossie May Ward and in the summer of 1957 and 1958 jumped on his mother's brother-in-law and "Beat him up terribly". He later killed Flossie May Ward coldly, openly and in the presence of others without speaking a word.

The Court held that where the evidence raised a "bona fide doubt as to defendant's competence to stand trial the judge on his own motion must impanel the jury and conduct a sanity hearing pursuant to the Statute of Illinois." The Court also held that the defense of his competency to stand trial by failing to demand a sanity hearing was not waived, by failing to demand a sanity hearing. The dissenting opinion concerned the quality of the incompetency that warrant postponing the trial and set out to test "The defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—then whether he has a rational, factual understanding of the proceedings against him". "* * * In short, emphasis is on capacity to consult with counsel and comprehend the proceedings and lower courts have recognized that this is by no means the same test as those which determine criminal responsibility at the time of the crime."

The dissenting opinion further set out "Whatever mild doubts this evidence may construe are surely alayed

by positive indication of Robinson's competence at the trial. Foremost in his own behavior in the court room. The conclusive factor is that Robinson's own lawyers, the two men who apparently had the closest contact with the defendant during the proceedings, never suspected he was incompetent to stand trial and never moved to have him examined on incompetentcy grounds during trial."

Kibert v. *Peyton*, 383 Fed. 2d 966. The petitioner Kibbert was convicted on a plea of guilty on June 4, 1959 and on June 20th Kibbert was transferred to the Virginia State Penitentiary and upon arrival there was immediately committed to its hospital section where the prison psychiatrist diagnosed his condition as "acute confusional state with depressive features" and administered 15 electroshock treatments and on September 18th he was committed to the Southwestern State Hospital for the mentally ill upon the psychiatrist's final diagnosis of "schizophrenic reaction—undifferentiated type." The court said "lay testimony taken in conjunction with the psychiatrist's diagnosis of psychosis made only three weeks after the trial demonstrated that Kibbert was incompetent at the time of the trial. * * * It is evident that the psychiatric diagnosis could not have been other than Kibbert was insane at the time of his trial".

In *Miller* v. *State of Missouri*, 493 S.W. 2d 413, the movant under Supreme Court Rule 27.26 asserted he was suffering from a mental disease or defect at the time of his offense and when he pled guilty on November 26, 1952. The record shows that on November 23, 1952 he was admitted to a hospital "with a history of having cut his left arm with a razor about 9:00 PM the night before while in jail." There were scratch marks on the left forearm with one wound "approximately three and a half cm long and no deeper than the subcutaneous fat" and he was treated and returned to the custody of the sheriff. The record further showed that he was admitted to the Fulton State Hospital on December 9, 1953 and on December 8, 1953 upon declaration of insanity and upon recommendation of the Division of Mental Health, Governor Donnelly suspended execution of the life sentence and ordered him trans-

ferred to the Fulton State Hospital until restored to reason. On May 2, 1956 a diagnosis was made of "schizophrenic reaction connection with occasional rage outbursts in sociopathic personality." Other testimony was heard of the prosecuting witnesses and Dr. Petersen at the hearing upon the motion but the court held that he did not show that at the time of entering his plea of guilty he was incompetent and that the evidence did not show that he lacked the ability to understand and cooperate in October and November of 1952. The Court further stated "neither can it be said the desire for a death sentence proves insanity, incompetency, or inability to cooperate." It is equally consistent with his "attempted suicide as a result of rejection".

In the case *Carpenter* v. *State of Missouri*, 449 S.W. 584, the defendant entered a plea of guilty and in the hearing on the plea of guilty it was called to the court's attention that movant had been confined in the Illinois State Penitentiary and had been given a series of shock treatments for mental illness with a diagnosis of "schizophrenic reaction—simple type, chronic". It was also pointed out and the case was our Supreme Court reversed the denial of relief sought in the motion pointing out that the trial court took the erroneous position that Carpenter's mental condition that the sole test under Missouri law was whether defendant knew right from wrong.

In *State* v. *Drope*, 462 S.W. 2d 677, the court stated "it appears from the record that an improper, or insufficient, motion for a psychiatric examination was filed * * *."

ON COMPETENCY OF COUNSEL

The Court has seen no deviation from the generally announced rule written by Mr. Justice Blackmun when he was on the Eighth Circuit bench in the case of *Slawek* v. *United States*, 413 F. 2d 957:

> ". . . the requirement of the Sixth Amendment is met whenever the accused is supplied with counsel who exercises the judgment expected of one trained

> in the law and committed to the diligent application of its principles; and that a petitioner will prevail on this issue (incompetency of counsel) only if it can be said that what the attorney did or did not do made the proceedings a mockery and shocking to the conscience of the court."

Followed by *Robinson* v. *United States*, 448 F. 2d 1255.

Counsel for movant in his brief states that it is inconveivable how it can be gainsayed that movant received effective assistance of counsel when counsel admits he did not prepare for trial and then he fails to put on any evidence in defense, especially in a widely publicized case where the accused faces the death penalty. In the first place there is no evidence that the case received wide publicity prior to the verdict nor can the Court recall any. Secondly, case after case is tried in our Criminal Courts without any evidence offered in defense. Experienced attorneys, specializing in criminal cases, and trial judges estimate this to be true in over ⅓ of the cases and especially where the defendant has a prior conviction. Thirdly, in a large percentage of cases the Court hears the plea "I am not prepared for trial". If this is to be taken at face value as indicative of ineffective assistance of counsel then indeed will our trial docket become hopelessly bogged down and the Court will be unable to insist upon the trial of cases within a reasonable length of time. If Courts wait for defense counsel to announce "ready" then numerous cases will linger for years. Mr. Watson displayed during the trial of the case itself that he knew what he was doing. His failure to specifically call the Court's attention to the provisions of Chapter 552 of the Revised Statutes of Missouri may have been due to his reliance upon the Court having some knowledge of its provisions.

Movant's counsel decries Mr. Watson's failure to raise the defense of insanity and it seems that this assumes that Mr. Watson failed to evaluate the psychiatric examination and report by Dr. Schumand and the feasibility and prospect of such a defense. Movant's counsel assumes that it was "an obvious crucial defense" and

that there was such a defense. After all, Mr. Watson was advised by Dr. Schuman and did interview his client and the prosecuting witness. Mr. Watson, being experienced counsel, may also have learned from such experience and observation that such a defense is hard to sell to a jury unless the evidence is very substantial. Counsel outlines, on page 42 of his brief, of what the Court was aware of is not borne out by the record and the evidence.

Counsel for movant has been most diligent in accepting this appointment as counsel in this case and filed an exhaustive and excellent brief and for this the Court is indebted to him.

Conclusion and Order

It is the conclusion of the Court that under all of the facts and circumstances of this case and under the law the movant was not entitled to a psychiatric examination to determine his competence to be tried, convicted and sentenced and that his constitutional rights were not violated by the failure to order a psychiatric examination and by conducting the trial and receiving the verdict in movant's absence and that he did receive effective assistance of counsel.

WHEREFORE, movant's motion under Supreme Court Rule 27.26 is overruled.

/s/ David A. McMullan
Judge
June 26, 1972

Filed June 26, 1972

TRANSCRIPT APPROVED

This Transcript is hereby approved this 20th day of July, 1972.

/s/ David A. McMullan
DAVID A. MCMULLAN
Judge

oOo

CERTIFICATE OF REPORTER

I, Joan Hamilton, Official Court Reporter in Division No. 7 of the Circuit Court of the City of St. Louis, State of Missouri, do hereby certify that the foregoing 29 pages are a true and accurate copy of the transcription of my notes taken in the foregoing cause.

/s/ Joan Hamilton
JOAN HAMILTON
Official

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that James Edward Drope, above-named, hereby appeals, in forma pauperis, to the St. Louis Court of Appeals from order entered on June 26, 1972 overruling movant's motion to vacate judgment and sentence filed pursuant to Rule 27.26.
Filed: July 7, 1972

/s/ Charles A. Weiss
CHARLES A. WEISS
Attorney for Movant
500 North Broadway
St. Louis, Missouri 63102
231-8600

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT
DIVISION TWO

APRIL SESSION, 1973

No. 34797

JAMES EDWARD DROPE, MOVANT, APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

APPEAL FROM CIRCUIT COURT OF THE CITY OF ST. LOUIS
FOR CRIMINAL CAUSES

Hon. David A. McMullan, Judge

Opinion Filed: June 5, 1973,
Reported at 498 S.W. 2d 838.

SMITH, *Presiding Judge*:

James Drope appeals from a judgment of the Circuit Court denying relief on his motion filed pursuant to Rule 27.26, V.A.M.R. Specifically, he complains of the trial court's finding: (1) that he was not entitled to a psychiatric examination and hearing before, during, and after his original trial to determine his competency to be tried; (2) that he was not denied due process when the trial court conducted a portion of his trial in his absence; and (3) that he was not denied effective assistance of counsel.

Drope was convicted in June, 1969 of the forcible rape of his wife. That conviction was upheld on appeal. See State v. Drope, 462 S.W.2d 677 (Mo. 1971). The rape charged occurred on January 17, 1969. Drope and four of his friends entered the Drope home at approximately 1:30 a.m. and, threatening Mrs. Drope with a gun, tied her spreadeagled to the bed. They also acquired a knife from the kitchen as an additional coercive device. For

approximately the next two hours they proceeded to have intercourse with her, oral and vaginal, frequently two men concurrently. Each of the four comrades of Drope had both forms of intercourse; Drope himself had oral and rectal intercourse. Drope was present throughout and apparently directed the activities, telling his friends what to do. Upon completion Mrs. Drope was left bound and gagged and, as he left, Drope advised her, "[T]his isn't the first time this is going to happen." Mrs. Drope was released by the eldest of their five children (six years old) all located in the adjoining room, who cut the ropes with a kitchen knife. Drope was apprehended shortly thereafter when he returned home. While in police custody he admitted the activity and said it started out as a "joke." Following a finding of guilty by the jury the court [1] assessed punishment at life imprisonment.

Drope was freed on bond shortly after his arrest and was represented by counsel retained by his mother. Counsel had Drope examined in February 1969 by Dr. Joseph Shuman, a psychiatrist. Dr. Shuman prepared an extensive report after talking with Drope for approximately an hour and a half, and with Mrs. Drope, his wife.

We set out in an appendix that report *in toto* because of its relevance to movant's contentions. Following this report Drope, through his counsel, filed a motion for psychiatric examination which was denied because not in proper form. The case was set for trial, and Drope was present on the trial date. His counsel was not and explained upon his arrival that he understood the matter was not to be set until September (the trial date was June) and his client would be examined prior to trial. Counsel also professed his unreadiness to try the case. Continuance was denied and a jury selected. The next day the evidentiary portion of the trial commenced. Drope's wife testified as well as three other witnesses, two of whom were present in police headquarters when Drope made a statement admitting his participation in the rape.

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[1] Drope was tried as a second offender. Sec. 556.280 RSMo 1969.

The next morning Drope shot himself in the stomach with a .22 rifle. Testimony taken in connection with Drope's motion for new trial was conflicting. His testimony was that he remembered nothing about the incident except the hot pain in his stomach. His witnesses testified he was unconscious after the shooting and did not regain consciousness for some considerable time after his surgery. There was testimony, on the other hand, that Drope was conscious in the hospital and stated that he shot himself to avoid trial and to prevent being convicted for something he didn't do. Drope did have surgery and remained hospitalized for 21 days. Upon learning of the shooting the trial judge ruled that Drope's absence was voluntary and proceeded with the trial. The court's action in doing so was upheld on appeal.

Movant's motion for new trial and the hearing conducted pursuant to it devolved into the production of evidence to establish whether Drope's shooting was voluntary or involuntary. The trial court obviously found it to be voluntary. No psychiatric testimony was presented at the hearing on the motion for new trial.

Upon his hearing on his 27.26 motion, Drope produced two phychiatrists. Their testimony was uncontradicted. Both testified that they were of the opinion that there was reasonable cause to believe that a person who would attempt suicide might not be competent to understand the proceedings against him, if he was in the midst of trial. Dr. Shuman additionally testified there was a possibility that a man could voluntarily shoot himself to prevent continuance of the trial. He also stated that at the time of his earlier examination he would not have believed Drope was contemplating suicide. Both doctors opined that even if the suicide attempt was to prevent continuance of the trial, they would still desire an examination to determine whether the man was competent to stand trial.

Movant's first two points are inextricably woven together and present the question of Drope's mental state during the trial. In his first point he contends the court erred in not ordering psychiatric examination and hearing to determine his competency to stand trial.

Section 552.020, RSMo 1969 provides: "(2) Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private physicians to make a psychiatric examination of the accused. . ."

Paragraph 6 requires that if the results of the examination are contested, or if the judge on his own motion orders it, a hearing shall be held to determine competency. In Pate v. Robinson, 383 U.S. 375 (1966) the statutory scheme provided by Missouri was elevated to constitutional dimensions. There it was held that where at any time during the proceedings reasonable doubt of defendant's competency arose, the trial court has an obligation *sua sponte* to conduct a hearing on competency. The facts upon which such hearing was required in *Pate* were extensive and came to the trial court's attention during the trial as a result of evidence introduced to establish Robinson's insanity at the time of the offense. It included, in part, evidence that (1) Robinson was hit by a brick while a child and thereafter acted "peculiar;" (2) he had episodes of sudden, unexplained violence toward objects and people; (3) he would have frequent dazes and unresponsive periods; (4) he was taken to a state hospital after an episode of violence and was found to be hallucinating and thought someone was after him; (5) he shot and killed his 18 month old son, then shot himself in the head, and then tried suicide by jumping in a lagoon; (6) he killed his common law wife by walking into her place of employment, and stared at her for about a minute and then shot her and another man.

The test of competency to stand trial, unchanged by *Pate*, is stated in Dusky v. United States, 362 U.S. 402 (1960) as follows: ". . . whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him." (1.c.402). See also § 552.020 (1) RSMo 1969.

By Missouri statute (§ 552.010, RSMo 1969) mental disease or defect is defined as: "congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or *otherwise antisocial conduct*, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms 'mental disease or defect' do not include alcoholism without psychosis or drug abuse without psychosis or *an abnormality manifested only by criminal sexual psychopathy* as defined in § 202.700. . ." (Emphasis supplied).

In determining whether Drope's rights under *Pate* and the Missouri statutes were violated we must examine whether "reasonable cause" existed of movant's competency at three different times—before the trial, during the trial after the suicide attempt, and at the time of the motion for new trial. Prior to the trial the court had only the Shuman psychiatric evaluation upon which to have made a determination. That evaluation does not raise a reasonable doubt of Drope's fitness to proceed. The report reflects Drope did not have "any delusions, illusions, hallucinations, obsessions, ideas of reference, compulsions or phobias at this time." Mr. Drope was "well oriented in all spheres." "He was able, without trouble, to answer questions testing judgment." Abnormal sexual acts are a part of his "culture" and on the basis of the report even if sexual perversion was a form of mental disease in some cases, it apparently is not in Drope's case. The conclusions are that Drope is (1) sociopathic—a synonym for anti-social which is specifically exempted as a mental disease or defect under Missouri law; (2) sexually perverted—again exempted; (3) borderline mental deficiency—but no indication it is severe enough to prevent cooperation and understanding, and the report indicates the contrary is true; (4) chronic anxiety reaction with depression—treated by the doctor with tranquillizers and again indicated as not interfering with Drope's understanding or cooperation and explained as based in part on his legal troubles.

We are able to put little weight on Mrs. Drope's feelings that her husband had mental problems, as that matter bore on his sexual perversions—not his competency. Nor are certain related episodes where he rolled down the steps because he didn't get his way particularly impressive. These episodes occurred only three times in ten years; in each case he immediately arose and the episodes demonstrate pique more than anything.

There is no indication in this record of any actual failure of understanding or cooperation by Drope with his attorney, nor of any lack of understanding of the nature of the proceedings. We cannot therefore find reasonable doubt of competency to order psychiatric examination or hearing before trial.

Movant contends that his suicide attempt coupled with the earlier report established such doubt during the trial. While recognizing that *Pate* was determined upon facts which arose during trial and which the Court concluded required a competency hearing, we are unable to conclude that *Pate* required the interruption of movant's trial for such purpose. Initially, we do not find in *Pate* any holding that the hearing must occur during trial, rather than immediately thereafter. Secondly, *Pate* involved a *competency hearing* rather than a *competency examination* and hearing as is contemplated by the Missouri statutes. It may be practically feasible for a hearing to be held in the absence of the jury during a trial without unduly delaying the trial. But an adequate psychiatric examination could not be made during the trial without requiring a substantial delay in the trial.[2] And it is at least arguable that a mistrial declared *sua sponte* by the judge during the trial, particularly over the objection of defendant, would bring double jeopardy considerations into play if in retrospect the mistrial was an abuse of discretion. See United States v. Jorn, 400 U.S. 470 (1971). We therefore hold that it was within the discretion of the trial court, if

[2] One of movant's psychiatrists testified that a week or more was required to examine a defendant certified for psychiatric examination.

he became aware of doubts of competency during the trial, to delay ordering *sua sponte* an examination and hearing until the close of the case.

We turn to the third time period, the post-trial period prior to sentencing. Once again it is asserted that the suicide attempt coupled with the psychiatric report raised a reasonable doubt of competency requiring an examination and hearing at that point. We will accept *arguendo* movant's contention, inferentially disputed by the state, that Drope's actions in shooting himself was in fact a bona fide attempt at suicide.

We will also accept as true the psychiatric testimony on the 27.26 hearing, that to these psychiatrists, an attempt at suicide would raise a reasonable doubt as to a man's competency to proceed with trial. We note, however, and emphasize, that at no time did these experts testify such attempt established incompetency to proceed but only raised in their expert opinion a doubt. Turning once again to *Pate* we find the following: "The State concedes that the conviction of an accused person while he is legally incompetent violates due process . . . and that state procedures must be adequate to protect this right." (l.c.378).

We do not find in *Pate* any indication that the evidence of reasonable doubt of competence can be elicited in the first instance during a post-conviction proceeding seeking to set aside the conviction. To reiterate, in *Pate* the evidence upon which reasonable doubt was found to exist was all before the trial court during defendant's original trial. In Drope's case, the critical evidence relied upon to establish the reasonable doubt, the psychiatric testimony, was presented for the first time in the post-conviction 27.26 proceeding. At the time judgment was finally entered and sentenced imposed against Drope, the court had before it the pre-trial psychiatric report and the fact of an attempted suicide, and evidence that that attempt was to avoid trial. We are unable to conclude that as a matter of law an attempt at suicide creates a reasonable doubt as to the movant's competency to stand trial. See Miller v. State, 473 S.W.2d 413, (Mo. 1971) l.c. 418. And the expert medical opinion

of psychiatrists of such doubt cannot be imputed to a trial judge where such expert opinion is not before him. The procedures employed for protecting Drope's rights were not shown by movant to be inadequate. We cannot hold the finding of the trial court regarding defendant's competency to be clearly erroneous.

Movant's second point concerning the voluntariness of his absence from trial is largely determined by our ruling on the first point. Upon the evidence which the trial court had before it on the motion for new trial it was a permissible finding that Drope's suicide attempt was a voluntary act to avoid trial and so a waiver of his right to confront his accusers. The Supreme Court so found upon appeal. See State v. Drope, *supra*. The psychiatrist testimony at the 27.26 proceeding that such an attempt might have been the product of a lack of competency does not meet the burden of proof placed upon movant. Again we cannot hold the trial court's finding to be clearly erroneous.

Movant also asserts the ineffectiveness of his counsel. This is based upon (1) counsel's statement that he was not prepared for trial, and (2) counsel's failure to properly assert Drope's incompetence to stand trial. No testimony was presented from movant's trial counsel. He was apparently ill at the time of the 27.26 hearing, but the court left the hearing open to permit counsel's deposition to be taken. Either it was not taken or if taken was not made an exhibit or furnished to the court. The record of the trial does not support counsel's statement of his lack of preparation. Nor are we required to ignore what we know to be true, that such statements are frequently made to support a request for a continuance, as was true here.

Movant also contends counsel failed to present his defenses and failed to call his witnesses. No potential witnesses have ever been identified by movant; no indication of what testimony they might give has ever been presented; and the record indicates Drope was to have the witnesses present in court on the morning he shot himself but apparently did not. Nor does movant delineate any defense which his counsel failed to present, except

possibly insanity. Yet even there the record does not support a conclusion that such a defense was practically available. Neither the report of Dr. Shuman nor the nature of the crime itself demonstrate the availability of such defense. Movant's evidence does not meet his burden of establishing counsel's ineffectiveness due to lack of preparation.

As to the second ground we are once again without evidence to support a conclusion that counsel failed to advance a right of movant which he believed to be meritorious. The record before us is singularly devoid of any evidence that Drope was not in fact able to consult with his lawyer with a reasonable degree of understanding and that he lacked a rational as well as factual understanding of the proceedings against him. Unlike Brizendine v. Swenson, 302 F.Sup.1011 (W.D.Mo. 1969) there is evidence that counsel was aware of the provisions of Chapter 552, RSMo 1969, and made some effort to proceed under them. That he subsequently did not pursue such line of attack does not establish ineffectiveness, for it may equally well be based upon a considered judgment that such an attack was without support or merit. The trial judge who presided at both the original trial and the 27.26 proceeding had an opportunity to observe Drope's conduct and to determine the degree of cooperation existent. Counsel at no time complained of his client's inability to cooperate with him. It must be remembered that incompetency to stand trial is not established by showing the defendant has mental problems. The test enunciated by *Dusky, supra*, and the statute requires more. And in analysing counsel's effectiveness we are not required to ignore the oath which every lawyer in this state takes that: ". . . I will not counsel or maintain . . . any defense except such as I believe to be honestly debatable under the law of the land;" and "will never seek to mislead the judge or jury by any artifice or false statement of fact or law; . . ."

The competency for trial is, in a very real sense, determined by the relationship and cooperation between client and attorney. In the absence of evidence that in fact such cooperation was not present, we are unable

to brand a lawyer's failure or refusal to allege and testify to that which he does not believe to be true as ineffectiveness. Representation of a client does not require or permit subornation of perjury or perjury itself. On the record before us, it is just as plausible to believe that counsel's failure to assert incompetency at the trial and afterward was based upon a factual knowledge that the tests of incompetency to stand trial had not been met, as that it was based upon ineffectiveness. We cannot find the ruling of the trial court clearly erroneous.

Judgment affirmed.

/s/ Gerald M. Smith
GERALD M. SMITH
Presiding Judge

Joseph J. Simeone, Judge, Concurs.

John J. Kelly, Jr., Judge, Concurs.

[Appendix to Opinion Omitted in Printing; The Report of Dr. Shuman is Reproduced Elsewhere in This Appendix.]

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT

APRIL SESSION, 1973

No. 34797

JUDGMENT

JAMES EDWARD DROPE, MOVANT, APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

APPEAL FROM THE CIRCUIT COURT OF CITY OF ST. LOUIS.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court herein being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment of the Circuit Court of the City of St. Louis for Criminal Causes, denying relief on appellant's motion (filed pursuant to Rule 27.26, V.A.M.R.) to vacate judgment and sentence heretofore rendered therein, be in all things affirmed and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

Filed: June 5, 1973.

No. 34797—James Edward Drope, Appellant, vs. State of Missouri, Respondent.

ORDER

Aug. 16, 1973—Appellant's motion for rehearing or transfer denied.

FOR THE COURT BY /s/ Judge Robert G. Dowd
JUDGE ROBERT G. DOWD
Chief Judge
Missouri Court of Appeals
St. Louis District

IN THE SUPREME COURT OF MISSOURI

SEPTEMBER SESSION 1973

Supreme Court No. 58447

Court of Appeals No. 34797

JAMES EDWARD DROPE, MOVANT-APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

TRANSFER

Now at this day, on consideration of movant-appellant's Application to transfer the above entitled cause from the ST. LOUIS DISTRICT OF THE MISSOURI Court of Appeals, it is ordered that said application be, and the same is hereby denied.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1973, and on the 8th day of October 1973, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 8th day of October 1973.

/s/ Thomas F. Simon
THOMAS F. SIMON
Clerk

SUPREME COURT OF THE UNITED STATES

No. 73-6038

JAMES EDWARD DROPE, PETITIONER

v.

MISSOURI

ON PETITION FOR WRIT OF CERTIORARI TO the Court of Appeals of the State of Missouri, St. Louis District.

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

May 13, 1974

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AUG 7 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Missouri Court of Appeals in this post-conviction proceeding, dated June 5, 1973, is reported at 498 S.W.2d 838 and is reprinted in the Appendix (A. 216-225). The unpublished statement of facts, conclusions of law, and order of the Circuit Court of the City of St. Louis dated June 26, 1972, is reprinted at pages 197-213 of the Appendix. The opinion of the Missouri Supreme Court dated January 11, 1971 on petitioner's direct appeal from his

conviction is reported at 462 S.W.2d 677 and is reprinted in the Appendix (A. 107-118).

JURISDICTION

The judgment of the Missouri Court of Appeals, St. Louis District, affirming the denial by the St. Louis Circuit Court of petitioner's motion to vacate his judgment of conviction and sentence pursuant to Missouri Rule 27.26, was entered on June 5, 1973 (A. 226). Petitioner's motion for rehearing or transfer to the Missouri Supreme Court was denied by the Missouri Court of Appeals on August 16, 1973 (A. 226). The Missouri Supreme Court denied petitioner's application to transfer on October 8, 1973 (A. 227), and the Petition for a Writ of Certiorari was filed in this Court on January 5, 1974. Certiorari and the motion for leave to proceed in forma pauperis were granted May 13, 1974. Jurisdiction of this Court is founded upon 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

1. Was the petitioner, who was on trial for raping his wife, entitled to a hearing under *Pate v. Robinson*, 383 U.S. 375 (1966), to determine his mental competency to stand trial, particularly in view of his mental history and his attempted suicide during the trial?

2. Under *Diaz v. United States*, 223 U.S. 442 (1912), may a defendant on trial for a capital offense be tried and convicted in absentia while being hospitalized after attempting suicide during the course of his trial?

CONSTITUTIONAL PROVISIONS INVOLVED

Amend. VI, U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amend. XIV, §1, U.S. Constitution:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

The Missouri statute governing the mental capacity of a defendant to stand trial (§552.020) is set forth in full in Addendum A to this brief. Missouri's Supreme Court Rule 27.26, which controls post-conviction proceedings, is reproduced in Addendum B to this brief. The Missouri Rape Statute (§559.260) appears in Addendum C.

STATEMENT OF THE CASE

Procedural Background

Petitioner was indicted on February 26, 1969, in the Circuit Court of the City of St. Louis for the forcible rape of his wife, a capital offense under Missouri law, which was alleged to have occurred late on the night of January 16 and early in the morning of January 17, 1969 (A. 6). His trial began on June 23, 1969 (A. 15), and a jury found him guilty of rape on June 25, 1969 (A. 65-66). Under the Missouri Second Offender's Act, §556.280, Mo.Rev.Stat., the Court sentenced him to life imprisonment (A. 66-67, 103-04), and the judgment and conviction were affirmed by the Missouri Supreme Court on January 11, 1971, in an opinion reported at 462 S.W.2d 677 (A. 107-118).

On April 16, 1971, petitioner filed, *pro se*, in the St. Louis Circuit Court his motion under Missouri Rule 27.26 (habeas corpus) to vacate his conviction and sentence (A. 121-27). The counsel appearing here were appointed by the Circuit Court on May 11, 1971, to assist petitioner (A. 4). In his Rule 27.26 motion, petitioner contended: (1) that the trial court had failed to determine whether he was competent to stand trial after his competency was placed in issue and that he was denied his right to a psychiatric examination and hearing to determine his competency to be tried, convicted and sentenced; (2) that he was unconstitutionally tried in absentia while he was hospitalized with a gunshot wound; and (3) that he failed to receive effective assistance of counsel (A. 121, 197).

As is the practice in the St. Louis Circuit Court concerning Rule 27.26 motions, petitioner's motion was assigned to the same judge who presided over his trial

(A. 4). An evidentiary hearing on petitioner's motion was held on July 21, 1971 (A. 4, 128-196). When more than nine months had elapsed after the hearing and the trial judge had yet failed to rule on the motion, petitioner on April 19, 1972, filed a petition for a writ of mandamus with the Missouri Supreme Court requesting that the trial court be ordered to rule promptly on the motion. Finally, on June 26, 1972, eleven months after the hearing, the trial judge overruled petitioner's motion (A. 197).

Petitioner appealed to the Missouri Court of Appeals, St. Louis District (A. 215), which on June 5, 1973, upheld the judgment of the Circuit Court in an opinion reported at 498 S.W.2d 838 (A. 216-25). The Court of Appeals essentially held that the Circuit Court was not clearly erroneous in finding that there was no evidence prior to petitioner's conviction and sentence which gave the trial judge reasonable cause to believe that petitioner was not mentally fit to proceed with trial. Following a denial by the Supreme Court of Missouri of petitioner's application to transfer the case (A. 227), petitioner sought a writ of certiorari in this Court, which was granted on May 13, 1974 (A. 228).

The facts and evidence surrounding petitioner's conviction, as elicited at the trial and the subsequent hearings, will be reviewed chronologically.

Pre-Trial Occurrences

On February 26, 1969, petitioner, together with two other men, was charged with the forcible rape of his wife, Marianne (A. 6). After the incident, which was alleged to have occurred on January 17, 1969, petitioner returned to living with Marianne and his

children at her request. He continued to live with her until they had a quarrel shortly before the trial (A. 45-48, 50-56, 191, 194).

Less than a month after the alleged rape, Marianne, on February 12, 1969, told petitioner's retained attorney (Mr. Watson) that she felt her "husband was sick and needed psychiatric care" (A. 45-46). She further indicated that she did not want to prosecute her husband, and she signed the following written statement:

> "Marianne Drope states that I do not desire to prosecute my husband James Drope on the charge of sodomy of which I complained to the police of the City of St. Louis on the date of January 17th, 1969. My reason for not proceeding with this prosecution is that I believe that my husband is suffering from a mental condition. We have five small children. I further believe if my husband receives treatment for his mental condition from a psychiatrist, that he will be much better off than having been prosecuted for this offense" (A. 45-46, 56-57).

Entertaining serious reservations about petitioner's mental condition, Mr. Watson advised Marianne that he would make an appointment for petitioner to see a psychiatrist and suggested to Marianne that she accompany him. Arrangements were made for petitioner and his wife to see Dr. Joseph Shuman, a psychiatrist, on February 20, 1969. Dr. Shuman conducted only a simple examination taking no more than an hour and a half (A. 129). He did not examine petitioner for the purpose of determining whether he had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or whether he had a rational as well as factual understanding of the

proceedings against him. Nor did Dr. Shuman make or attempt to make any findings on these points. Dr. Shuman recommended that petitioner seek psychiatric treatment at Malcolm Bliss Mental Hospital, and he told Marianne that petitioner had mental problems (A. 46).

On February 22, 1969, Dr. Shuman made a written report of this interview in which he noted that petitioner would wring his hands and that he had difficulty in talking because of his marked anxiety. The report traced his troubled childhood and related that petitioner thought "he heard voices after his stepfather died and he also described hearing voices only last January and that he saw a vision of his stepfather and grandmother and, apparently, had a conversation with them" (A. 10). Dr. Shuman further pointed out that petitioner had a difficult time relating and was highly circumstantial and irrelevant in his speech (A. 11). The report concluded:

> "This is a very neurotic individual who is also depressed and perhaps he is depressed for most of the time. Apparently, he certainly has much reason for this. As for the diagnosi I want to offer: (1) Sociopathic personality disorder, sexual perversion. (2) Borderline mental deficiency. (3) Chronic anxiety reaction with depression" (A. 12-13).

After the visit to Dr. Shuman's office, petitioner made several visits to the outpatient clinic at Malcolm Bliss Mental Hospital for treatment (A. 48-49, 194).

Petitioner's case was set on the trial docket for April 14, 1969. On that date, however, he was granted a severance from the other two co-defendants, and trial was continued until May 26, 1969. Petitioner's attorney and the prosecuting attorney in the meantime, however, apparently agreed that petitioner should have a psychiatric examination before he stood trial (A. 16,

19, 181). Accordingly, on May 27, 1969, petitioner's counsel filed a motion for a psychiatric examination reading as follows:

> "Comes now the Defendant, James E. Drope, and states to the Court that he has had a psychiatric examination made by Dr. Joseph F. Shuman, M.D., a copy of which report is attached hereto.
>
> "Defendant moves the court to continue his case until September, 1969, in order that he might receive an Examination, Evaluation and psychiatric treatment as suggested by Dr. Shuman at the Malcolm Bliss Hospital in the City of St. Louis, Missouri" (A. 7)

Attached to the motion was a copy of Dr. Shuman's report. On the same day, the prosecuting attorney filed a memorandum with the court, in effect consenting to the request for a psychiatric examination:

> "Comes now the State of Missouri and does not oppose the motion for a psychiatric examination of the Defendant James E. Drope in the above entitled cause" (A. 8).

On May 29, 1969, petitioner's case was continued to the docket of June 23, 1969, although evidently no actual notice of this was sent to petitioner or his attorney (A. 17). The record is clear that no ruling was ever made on petitioner's motion for a psychiatric examination.

Petitioner discovered only by chance that his trial had been set for June 23 when his wife's stepfather told him a few days before that date that he had received a subpoena to appear as a witness on June 23 (A. 188). Petitioner was unable to locate or contact his attorney, and he did not have an opportunity to consult with his attorney between the time he was

advised of the trial setting and the commencement of the trial (A. 181-82). Petitioner's attorney claimed that he had not been notified and was unaware that the trial was set for June 23, apparently assuming that the motion for a psychiatric examination had been or would be granted or at least that the case would not be set for trial until a ruling was made on the pending motion (A. 15-21).

The Original Trial

Petitioner's attorney, Mr. Watson, failed to appear for the trial on June 23, and the trial judge, obviously irritated, ordered the Sheriff to bring him in. When Mr. Watson finnaly arrived, he apprised the court of his motion for a psychiatric examination filed on May 27 and fervently stated to the court that he had been unaware that the trial had been set for June 23. He stated that he had been informed the case would be carried over to September in order that petitioner could be given a psychiatric examination to determine whether he was fit to stand trial, and that consequently he had not prepared the case for trial (A. 15-17).

The court understood that Mr. Watson had requested a psychiatric examination for petitioner but impatiently noted that since it was not in proper form,[1] "then no Motion has been filed" (A. 16-18). Thereupon Mr. Watson stated that "I am objecting to going to trial with this defendant also for the reason that the

[1] There is no required form for a motion for a psychiatric examination under either Missouri state or St. Louis local procedural rules.

defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" (A. 19). The motion was summarily overruled, and examination of the prospective jurors was immediately begun.

Following the finalization of selection of the jury on June 24, the State called Marianne Drope as its first witness against her husband (A. 22). Marianne testified that petitioner participated with four of his acquaintances in forcibly raping her and subjecting her to other aberrational sex acts on the night of January 16, 1969. She stated that she was tied to the bed and while the others took turns raping her, petitioner at times held a gun to her head and at other times held a knife to her throat (A. 26-27). She had been married to petitioner for seven years, and they had five children ranging in age from nine months to six years (A. 22). After the incident she continued to live with petitioner until just prior to the trial (A. 45-48, 50-56). She admitted having abnormal sexual relations with her husband before (A. 47), and she had felt that her husband was mentally sick and in need of psychiatric care (A. 45). For this reason she did not desire to prosecute her husband, and she admitted having so informed petitioner's attorney and having signed a statement to that effect, which was read into the record (A. 45-46).

Marianne testified about accompanying her husband to see Dr. Shuman, and recalled that she told Dr. Shuman that petitioner was sexually perverted and had performed some very unusual sex acts on her. She said that Dr. Shuman had recommended that petitioner undergo treatment at Malcolm Bliss Hospital, "but Jim would not go" (A. 48).

On occasions when petitioner did not get his way or was worried about something, he would roll down the

stairs. When asked if she knew why he behaved in that manner, his wife replied, "the only thing I can tell you is what they told him many times at City Hospital, that is something he does upon hisself" (A. 47-48). She testified that during their marriage, petitioner always had been very nervous but had been even more nervous since the incident of January 16 (A. 48). She said that she changed her mind about not wanting to prosecute petitioner and decided to testify against him when they fought and he tried to choke and kill her on the Sunday evening just prior to the trial (A. 52).

During the cross-examination of Marianne, petitioner's attorney continually raised the question that petitioner had suffered from blackouts and was mentally ill (A. 42-56, 59-61).

The State did not conclude its case on June 24, and when court was convened the next morning the following discussion occurred in the presence of the jury:

> "THE COURT: Good morning, members of the jury. We were delayed through no fault of either the Court or the attorneys in this case. I just want to let you know that. * * * You may proceed.
>
> "MR. WATSON: Your Honor, at this time I am going to move for a mistrial in view of the fact that the defendant, I am informed, shot himself this morning.
>
> "MR. FRANK: Wait—
>
> "MR. WATSON: I am addressing the Court.
>
> "THE COURT: Wait.
>
> "MR. WATSON: The defendant, I understand, shot himself this morning. He is in the City Hospital being operated on.
>
> "THE COURT: Just a minute. The Court already decided that the matter would proceed for trial.

"MR. WATSON: Your Honor, it makes it awful difficult for me to go to trial without the client.

"THE COURT: That is the difficulty, Mr. Watson, that your client brought about, not you, not the Court. He was on bond and his responsibility to be here. So the Court will proceed with the case.

"MR. WATSON: My motion then is overruled, Your Honor?

"THE COURT: Yes" (A. 63).

Although the record is unclear, apparently petitioner's relatives had called the court and had advised the trial judge that petitioner had been found shot in the stomach and had been rushed unconscious to City Hospital, but no hearing or inquiry was conducted to ascertain the facts and circumstances surrounding the shooting, and the trial without hesitation proceeded in petitioner's absence. The State called five more witnesses, introduced evidence of petitioner's prior conviction and rested on that day.[2] At the close of the prosecution's case, petitioner's counsel moved for judgment of acquittal and again stated:

"The Court should have declared a mistrial when Defendant moved for same, when it became apparent that the Defendant shot himself and could not further attend the trial as he is confined as a Patient in the City Hospital of St. Louis No. 1, therefore depriving him of being confronted by his accusers as he is being tried in absentia" (A. 64).

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[2] The Missouri Supreme Court's opinion in the direct appeal, 462 S.W. 2d at 677, erroneously states that after the start of the trial on June 23, the court heard four witnesses on June 29 and then recessed. Actually, the trial commenced on June 23 and ended on June 25 (A. 1-2).

The court summarily overruled both motions. Defense counsel then announced that he had no evidence to present, as the defendant was not available to testify (A. 64). The jury returned a guilty verdict on June 25, 1969 (A. 65-66), and on July 21, petitioner was sentenced to life imprisonment (A. 66-67).

The Hearing on Petitioner's Motion for New Trial

On July 30, 1969, petitioner's attorney filed a motion for a new trial (A. 67-69). A hearing on that motion was held on September 19, 1969 (A. 69). The only issue pursued there was petitioner's absence from the trial. The question of his mental condition at the time of trial was not considered or discussed, and no evidence was presented concerning that question. Petitioner generally testified that he did not remember what happened to him on the morning of June 25, 1969. He had gone to his brother's house on the morning of June 25 to get a change of clothes. He remembered going down into the basement to get his clothes. After getting his clothes he turned the light out and felt a hot burning sensation in his stomach. He remembered nothing after that until he woke up in Homer G. Phillips Hospital several days later (A. 71-73). He was hospitalized for a total of 21 days (A. 146-147).

After petitioner's direct testimony at the hearing, the court, over the vigorous objection of petitioner's attorney, granted the State a two-week continuance until October 3 so that it could gather evidence for cross-examination of petitioner and for its rebuttal (A. 73-76).

At the adjourned hearing on October 3, Patrolman Jerome Dampier, for the prosecution, testified that he received a call around 8:00 or 8:15 a.m. on June 25, 1969, relative to an attempted suicide at 5230 Buliver. He stated that after talking to petitioner's mother at the scene, he drove to the hospital and talked to petitioner's brother, who told the patrolman that petitioner had shot himself in the stomach and that he had taken him to the hospital. Patrolman Dampier stated he also talked to petitioner, who told him that he was supposed to go to court and that "he would rather be dead than to go to trial for something he didn't do. So he got his rifle out of his basement and went to the garage and shot himself" (A. 94-98).

On October 15, the trial court overruled petitioner's motion for a new trial, holding that the burden of proof was on the petitioner to prove that his absence from trial was not voluntary (A. 102-03). Subsequently, on October 21, the court again sentenced petitioner to life imprisonment (A. 103-04).

Petitioner, represented by Mr. Watson, appealed his conviction to the Missouri Supreme Court but did not specifically raise the issue concerning his mental capacity to proceed with the trial. The Supreme Court on January 11, 1971, affirmed petitioner's conviction on the points raised in the appeal (A. 107).

The Hearing on Petitioner's Rule 27.26 (Habeas Corpus) Motion

After petitioner had filed his habeas corpus motion under Missouri Rule 27.26, a hearing was held, at which petitioner called two psychiatrists, his brother, Homer

Case, and his former stepfather, in addition to taking the stand himself. The State called no witnesses and presented no evidence whatsoever to rebut petitioner's case.

Both psychiatrists testified that given the facts and circumstances surrounding petitioner's trial, his behavior before trial and his past medical and psychiatric history, and especially his attempted suicide, there was at least reasonable cause to believe that he was suffering from a mental disease or defect evidencing his unfitness to proceed with his trial and requiring a psychiatric examination (A. 128-43, 149-62).

Dr. Shuman stated that he had examined petitioner sometime in February, shortly after he was alleged to have taken part in raping his wife and four months before his trial, and that he had written the report referred to above. His examination of petitioner consisted of an interview for a period of about 1½ hours and also a short interview with petitioner's wife. He concluded that petitioner was mentally ill and needed institutionalized treatment. He noted that he found him to be an extremely nervous man who was a borderline mental deficient and prescribed a tranquilizer for him (A. 135-41).

Dr. Shuman stated that almost without exception people who attempt suicide are mentally ill and are not acting rationally. He agreed that psychiatrically well (normal) persons never or rarely make suicide attempts, regardless of the severity of the social stresses to which they are subjected, and that any person who threatens suicide is in need of immediate and definitive treatment (A. 132-133).

Dr. Shuman further testified that the fact of petitioner's shooting himself in an apparent suicide attempt during the course of his trial was enough to

raise a reasonable cause to believe that petitioner was not fit to proceed with his trial in that he lacked capacity to understand the proceedings against him or to assist in his own defense (A. 133-138). The following testimony is particularly pertinent:

> "Q. Doctor, based upon your knowledge in the field of psychiatry, your educational and practical background, do you have an opinion as to whether or not a person who attempts a suicide, whether or not that act of attempted suicide would be reasonable cause to believe that one might not be mentally competent at that time to understand, say, the proceedings around him, if he was in the midst of a trial?
>
> * * *
>
> "A. There is reasonable cause.
>
> * * *
>
> "Q. Now, doctor, our statute says that a mental disease or defect sufficient to give rise to a cause here where a man might not be able to understand the proceedings around him, does not mean any type of medical classification, . . . [b]ut it means merely a disorder sufficient to cause the results indicated. We are not talking about any mental disease or defect, psychotic or neurotic, but, in your opinion, a man who attempts a suicide, based on the hypothetical that Mr. Williams just gave you, he has been accused of taking four of his buddies home and raping is wife and standing trial and actually goes to court for one day and hears testimony, comes home and makes an attempt on his life early the following morning. Would that give you reasonable cause, as a psychiatrist, to believe that he might have such a mind that it might not be able to allow him to proceed with the trial?
>
> "A. Yes, that does give reasonable cause" (A. 133-34, 138).

Dr. Jon Tek Lum testified that since 1969 he had been Director of Forensic Services at Malcolm Bliss Mental Health Center, with the duty of examining or supervising the examination of accused persons pursuant to orders of the St. Louis Circuit Court to determine whether or not they are fit to stand trial under Missouri's Mental Responsibility Statute, (A. 150-52).

He noted that petitioner had a history of mental trouble and that he had examined petitioner in 1965 while petitioner was a patient in City Hospital No. 1 and found that he was in need of psychiatric care and treatment (A. 153). Dr. Lum further testified that petitioner should have been accorded a psychiatric examination to determine whether he was fit to proceed with his trial:

> "Q. Doctor, do you have an opinion as to whether or not a person who has just attempted suicide during the course of his trial in which he has been accused of raping his own wife with four of his friends, whether or not he might be in need of psychiatric care?
>
> "A. Yes, I do.
>
> "Q. What is your opinion, doctor?
>
> "A. I feel that a man that has committed an act such as raping his own wife, or allegedly raping his own wife, and then afterwards during the trial, in the process of the trial, makes a suicide attempt is in need of at least a psychiatric evaluation to find out his mental condition (A. 151).
>
> * * *
>
> "I think if a man makes a suicide attempt on his life, shooting himself in the abdomen, I think this is a serious psychiatric indication that the man has a problem and needs to consult with a psychiatrist or should see a psychiatrist. On that basis, people that make suicide attempts, some eighty-five percent of them have a true psychiatric

disorder. Dr. Robins and some of the other people at Washington University found that a lot of these people do in fact suffer from a psychiatric illness and show poor judgment. This suicide attempt, it does indicate poor insight and judgment. They also may have some distortions or irrational thinking, they may be severely depressed, and for these reasons, they should seek the help of a psychiatrist.

"Q. Now, doctor, we don't know whether he was mentally incompetent or not without an examination; is that correct?

"A. That is correct. I couldn't conjecture as to whether he was competent to assist in his own defense.

"Q. These factors in your mind would be a reasonable cause to believe that there might be something that would warrant a psychiatric examination –

"A. Yes" (A. 154).

Dr. Lum pointed out that if petitioner was acting under a mental disorder when he attempted to kill himself, such decision might not have been voluntary and willful (A. 155).

Petitioner himself testified that shortly after the incident of January 17, Marianne asked him to come back and live with her and that they cohabited until about a week before the trial. Because of a mix-up as to his trial date, petitioner was unable to locate or contact his attorney, and he did not have an opportunity to consult with his attorney prior to the trial. He further testified that he remembered nothing about being shot but that his only recollection was waking up in Homer G. Phillips Hospital in a state of confusion. He denied making any statement to the police at the hospital (A. 184-85, 188-89).

The trial court overruled petitioner's motion for post-conviction relief, finding that nothing that occurred before, during or after his trial suggested the necessity or desirability of a psychiatric examination. On appeal, the Missouri Court of Appeals affirmed, holding that the evidence presented at the post-conviction hearing was not before the trial court at the time of trial and that the trial judge could not be imputed with such knowledge. The Court of Appeals concluded that the finding of the trial court regarding defendant's competency was not clearly erroneous.

SUMMARY OF ARGUMENT

This case is squarely ruled by *Pate v. Robinson*, 383 U.S. 375 (1966). At no stage of the proceedings was petitioner accorded a psychiatric examination or a hearing to determine his competency to stand trial, in spite of substantial evidence of a history of mental problems, repeated requests by trial counsel for an examination, admissions by petitioner's wife that he was mentally ill and his attempted suicide during the trial. By any standard, the evidence before the trial court created at least a reasonable doubt of petitioner's competence and compelled a psychiatric examination and a hearing.

Petitioner, on trial for a capital offense, was further denied due process by being tried *in absentia* while in the hospital undergoing emergency surgery after his suicide attempt. Under *Diaz v. United States*, 223 U.S. 442 (1912), he had the absolute constitutional right to be present, physically as well as mentally, during his trial for a capital offense. This right is so fundamental that it cannot be waived. Yet the Missouri courts not

only held that petitioner could waive the right to be present but, without a psychiatric examination or a hearing, determined summarily that his suicide attempt constituted a willful and voluntary waiver of that right.

ARGUMENT

I.

PETITIONER, WHO WAS ON TRIAL FOR RAPING HIS OWN WIFE AND WHO ATTEMPTED SUICIDE DURING HIS TRIAL, WAS ENTITLED UNDER FEDERAL CONSTITUTIONAL LAW TO A PSYCHIATRIC EXAMINATION AND A HEARING TO DETERMINE HIS MENTAL COMPETENCY TO BE TRIED, CONVICTED AND SENTENCED, SINCE THERE WAS EVIDENCE PRESENT WHICH RAISED A REASONABLE DOUBT AS TO HIS COMPETENCE TO STAND TRIAL.

Despite the vigorous and repeated supplications and the substantial evidence before the trial court that petitioner was not mentally fit to proceed with his trial, including the fact of his nearly successful suicide attempt during his trial, no psychiatric examination or hearing to determine his mental competency was ever accorded petitioner at any stage of the proceedings. The trial court did not even pause to inquire about petitioner's competency. The holding of the state appellate court that there was nothing before the trial court which raised a reasonable doubt as to petitioner's competency was induced by expedient myopia, was

squarely contrary to this Court's holding in *Pate v. Robinson*, 383 U.S. 375 (1966), and denied petitioner due process of law.

This Court in *Pate v. Robinson, supra*, plainly held that when there is evidence before the trial court which raises a bona fide doubt as to a defendant's competence to stand trial, the accused under the due process clause of the Fourteenth Amendment is constitutionally entitled to a hearing on the issue of his capacity to proceed.[3] Even if the parties fail to bring the issue to the court's attention by an appropriate motion, the court is obliged to act *sua sponte*. Essentially, *Pate* declared that federal constitutional law, rather than

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[3] Long before *Pate*, it had been a well-established and fundamental precept that the trial of an incompetent defendant violates due process. See, e.g. *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899); *United States v. Chisolm*, 149 F 2d 284, 289-290 (8th Cir. 1906); *Massey v. Moore*, 348 U.S. 105, 108 (1954); *Bishop v. United States*, 350 U.S. 961 (1956); *Dusky v. United States*, 362 U.S. 402 (1960). Conviction while incompetent is tantamount to a denial of the right to be present, to confront one's accusers and to defend oneself, for a defendant must possess sufficient present ability to consult with his attorney and have a rational as well as a factual understanding of the proceedings in order to make his "presence" at trial meaningful. *Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970); Note, "Incompetency to Stand Trial," 81 Harv. L. Rev. 454, 458 (1967). *Pate*, however, recognized and raised to constitutional proportions the additional right of a defendant to an adequate hearing on his competency to stand trial whenever a bona fide doubt as to that issue exists. *Pate* properly noted that such a hearing is a crucial and indispensable safeguard to insure that an accused whose mental fitness is in doubt is not tried and convicted while incompetent.

state law, governs a defendant's right to a hearing on his competency to stand trial.[4] The test of competency to stand trial was outlined by this Court in *Dusky v. United States*, 362 U.S. 402 (1960):

> "It is not enough . . . that the defendant is oriented to time and place and has some recollection of events . . . the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding–and whether he has a rational as well as factual understanding of the proceedings against him."

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[4] Missouri, before this Court's decision in *Pate*, recognized the the common-law prohibition against the conviction of all incompetent accused and enacted a statutory scheme designed to protect against such an occurrence. The Missouri statute §552.020, which is that reproduced in Addendum A, *infra*, provides, *inter alia*, that *whenever*-- at any stage of the proceedings--any judge has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed, he *shall* upon his own motion or motion of the prosecution or the accused *order a psychiatric examination*, and if the results of the psychiatric report are contested, a hearing must be held. The Missouri statute *conclusively presumes*, therefore, that the court requires the aid of medically and psychiatrically trained persons in order to make a meaningful determination as to a defendant's competency and recognizes that a psychiatric examination is an essential prerequisite to an informed hearing. But, as observed in *Kibert v. Peyton*, 383 F.2d 566, 569 (4th Cir. 1967), this type of statute will work only if it is used:

> " 'What emerges from this humane legislation is the assurance . . . .that one whose mental capacity to cope with the exigencies of a trial is in doubt shall not be put in jeopardy without a preliminary inquiry into his present mental condition.'
>
> "The protection afforded the defendant by the legislation is illusory, however, if, when a reasonable doubt as to his sanity arises, neither court nor counsel seeks to utilize the procedures provided by the state for determining competency."

The issue presented here, then, is whether the Missouri courts applied the law as prescribed in *Pate*, and whether there were facts and evidence present before the trial court which raised a reasonable doubt as to petitioner's competency entitling him to a psychiatric examination and a hearing.

As is often the case, legal principles such as those announced by the Court in *Pate* are more easily explicated than applied. Difficulty of application or dissatisfaction with the immediate consequences, however, cannot justify a denial of due process. The Missouri courts which dealt with petitioner's case paid lip service to the precepts of *Pate*, but wholly failed to implement its teachings. *Pate* cannot be meaningfully or materially distinguished, either legally or factually, from this case.[5] If anything, the evidence before the trial court in the instant matter raised a more substantial doubt about petitioner's ability to participate effectively in his trial than did the evidence in *Pate*.

The Missouri Court of Appeals struggled vainly to distinguish *Pate* by reference to what it termed "extensive" facts before the trial court there which

[5] The similarities between the two cases are interesting. In *Pate*, defendant Robinson, like petitioner, was attacking his conviction by way of habeas corpus. He had been convicted of the murder of his common-law wife by an Illinois court and sentenced to life imprisonment. Robinson had contended on appeal to the Illinois Supreme Court that the trial court erred in failing to hold a hearing to determine whether he lacked mental competency to stand trial. The Illinois Court, however, found that neither Robinson nor his attorney had requested a hearing on his mental competency to stand trial, and, like the Missouri Court of Appeals below, found that the evidence had failed to raise sufficient doubt as to his competency to require the trial court to conduct a hearing. *People v. Robinson*, 174 N.E. 2d 220 (1961). Robinson's case later reached this Court after being processed through the federal system, whereas petitioner's came directly from the state courts.

required a hearing, emphasizing the following evidence in *Pate*:

> "(1) Robinson was hit by a brick by a child and thereafter acted 'peculiar'; (2) he had episodes of sudden, unexplained violence toward objects and people; (3) he would have frequent dazes and unresponsive periods; (4) he was taken to a state hospital after an episode of violence and was found to be hallucinating and thought someone was after him; (5) he shot and killed his 18 month old son, then shot himself in the head, and then tried suicide by jumping in a lagoon; (6) he killed his common-law wife by walking into her place of employment, stared at her for about a minute and then shot her and another man."[6]

The Missouri court, however, either failed to recognize and consider or sought to minimize evidence and facts before the trial court below which were just as extensive and even more contemporaneous and pronounced. The trial judge was apprised of the following developments:

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[6]The Missouri Court of Appeals also appeared to attach significance to the fact that the petitioner's counsel in requesting a psychiatric examination never invoked the precise expression that "petitioner was unable to cooperate with him." The record, however, shows that petitioner's attorney did everything but recite the "magic words". He filed a written motion for a psychiatric examination attaching thereto Dr. Shuman's report (A. 7-13); he obtained the State's agreement not to oppose the motion (A. 14, 16, 19); he vigorously protested to the court that petitioner was not of "sound mind" to stand trial (A. 15-21).

In any event, this Court in *Pate*, rejected the requirement of precision in pleading (see 383 U.S. at 384-85, n.6) and categorically held that the defense of incompetency to stand trial cannot be waived by the incompetent; and it ineluctably follows that his counsel cannot waive it for him by failing to assert that right. *Kibert v. Peyton*, 383 F.2d 566 (4th Cir. 1967).

(1) Petitioner was charged with the deranged act of holding a gun to his wife's head and a knife to her throat while assisting four others to rape and commit sodomy on his wife, a crime so rare that no other comparable case appears in the annals of Missouri case law (A. 26-32).

(2) A month after the crime, petitioner's attorney harbored enough reservations about petitioner's sanity that he secured an appointment for him with a psychiatrist (A. 45-46).

(3) Petitioner's wife told his attorney that she felt her husband was mentally sick and needed psychiatric care, and signed a statement saying she did not want to prosecute him because she thought he was mentally ill and should receive psychiatric treatment (A. 45-47).

(4) Dr. Shuman, who had interviewed petitioner four months prior to trial, found that he was notably agitated and upset, and that he had problems with his memory and had difficulty in participating with the doctor during the interview. (A. 11). He further found that petitioner had a difficult time relating and was markedly circumstantial and irrelevant in his speech. Dr. Shuman's diagnosis was that petitioner was suffering from borderline mental deficiency, a sociopathic personality disorder, and chronic anxiety reaction with depression (A. 12). Dr. Shuman concluded that petitioner was mentally ill and needed psychiatric treatment.

(5) Petitioner's attorney, after receiving Dr. Shuman's report, filed a written motion requesting a court-ordered psychiatric examination to determine petitioner's competency to proceed with trial, and attached thereto Dr. Shuman's report (A. 7-13).

(6) The prosecutor apparently agreed that petitioner should be accorded a psychiatric examination and filed a memorandum, evidencing his consent thereto (A. 14, 16, 19).

(7) Petitioner's attorney throughout the trial continued to place in issue petitioner's competency, and on the first day of the trial he fervently and vigorously pleaded with the court to grant a psychiatric examination (A. 15-21). At one point in open court, petitioner's attorney protested: "I am objecting to going to trial with this defendant also for the reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" (A. 19).

(8) Petitioner's wife testified that on occasions when he did not get his way or was worried about something, he would roll down the stairs. She did not know the reason for this behavior but "the only thing I can tell you is what they told him many times at City Hospital, that is something he does upon hisself" (A. 47).

(9) During the course of cross-examination of petitioner's wife, his attorney continually raised the question of petitioner's mental competency (A. 42-56, 59-61).

(10) After the second day of his trial, petitioner attempted to kill himself and spent 21 days in the hospital recuperating.

Furthermore, in *Pate*, the parties had stipulated at trial that two or three months before trial, the defendant Robinson had been examined by a psychiatrist who had *specifically found* that he knew the nature of the charge against him and was able to cooperate with his counsel in the defense of that charge. Here, however, not only was no such finding

ever made, but on the contrary, Dr. Shuman concluded that petitioner was mentally ill and needed psychiatric treatment. Most of the irrational acts and behavior on the part of Robinson had occurred years before the trial, and Robinson at trial displayed mental alertness as well as an understanding and knowledge of the proceedings. He actually discussed the proceedings and his defense with the court in an intelligent manner.[7] By contrast, petitioner's disordered mind was dramatically manifested during trial when he attempted to kill himself.

Even the dissenting opinion by Mr. Justice Harlan in *Pate* supports the reversal of petitioner's conviction. The dissent took issue with the majority holding that the evidence presented to the trial court was sufficient to raise a bona fide doubt as to Robinson's competency. But Mr. Justice Harlan conceded that if one of Robinson's moments of deranged behavior had occurred at trial, a bona fide doubt would have arisen, necessitating a hearing. Hence, the prerequisites of even the *Pate* dissent were met here when petitioner displayed his severe mental instability by attempting to end his life.

Petitioner is not asking this Court to formulate new guidelines dealing with the problems of mental fitness to stand trial; rather he is simply seeking to avail himself of his constitutional entitlements under well established principles and previous decisions of this Court. It is unnecessary for the Court to break new constitutional ground in this case, for under the

[7] See the opinion of the Illinois Supreme Court at 174 N.E. 2d 820, 823. This Court in *Pate*, however, held that "While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." 383 U.S. at 386.

uncontroverted facts and circumstances cognizable to the trial judge there can be no serious contention that petitioner's competency was free from doubt.

The Missouri Court of Appeals abdicated its constitutional responsibilities in this case by rubber stamping the findings of the trial court as not "clearly erroneous." In determining whether there is "reasonable doubt," reviewing courts should apply an objective standard, rather than a subjective one. The question for resolution is whether, based on the facts and circumstances known to the trial judge, a reasonable man should have entertained a reasonable doubt about the defendant's fitness to stand trial. As the Ninth Circuit explained in *Rhay v. White*, 385 F.2d 883, 886 (1967):

> "[T]he question here is not why counsel failed to request a competency hearing or why the court failed to hold one on its own initiative, but whether, no less on hindsight than by foresight, there were elements of such indication in the situation as, if proper notice had been taken of them, could present a substantial question of possible doubt as to [the defendant's] competency to stand trial."

Once the trial judge is confronted by facts indicating the existence of a doubt as to a defendant's mental capacity, he cannot, on his own, sift and filter the various conflicting factors to conclude that the weight of the evidence points to competency. The court must not decide the ultimate issue without affording the accused a psychiatric examination and a right to a hearing. We are hard-pressed to improve on the procedural analysis of the Ninth Circuit in *Moore v. United States*, 464 F.2d 663, 666 (1972):

> "Under the rule of *Pate v. Robinson* (1966) 383 U.S. 375, 86 S.Ct. 836, 15 L.E.2d 815 a due

process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial. 'Substantial evidence' is a term of art. 'Evidence' encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial. *Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence.* The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial."[8]

In the case at bar, the Missouri Court of Appeals has taken an impermissibly narrow and unconstitutionally circumscribed view of what evidence raises a reasonable or bona fide doubt of an accused's competency.[9] It

[8] Emphasis ours here and throughout this brief except as otherwise noted.

[9] Contrast the Court of Appeals' decision with the following decisions which found the existence of a reasonable doubt on similar or less substantial grounds: *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973); *Moore v. United States*, 464 F.2d 663 (9th Cir. 1972); *White v. United States*, 470 F.2d 727 (5th Cir. 1972); *Negron v. New York*, 434 F.2d 386 (2d Cir. 1970); *Carroll v. Beto*, 421 F.2d 1065 (5th Cir. 1970) *cert. denied* 405

strains credulity to assert that the facts before the trial court, when weighed together, generated no serious misgivings as to petitioner's competency. The Missouri appellate court, in a palpably result-oriented opinion, refused to consider and weigh all of the evidence together as a whole, but unjustifiably splintered and fractionated certain aspects of the evidence for examination in a vacuum, in isolation from the others.[10]

Such an approach is not only illogical but legally defective, as held in *Moore v. United States, supra* at 666;

> "We need not decide whether the psychiatric report of December 30, 1967, standing alone, constituted substantial evidence that Moore was incompetent to stand trial. *It did not stand alone.* By the time Moore's guilty plea was taken, the reports from the Federal Bureau of Prisons were in his file. Those reports together with the report of December 30, 1967, constituted substantial evi-

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U.S. 1030 (1972); *Clonch v. Boles,* 419 F.2d 393 (4th Cir. 1969); *United States v. Silva,* 418 F.2d 328 (2d Cir. 1969); *Clark v. Beto,* 415 F.2d 71 (5th Cir. 1969); *Morris v. United States,* 414 F.2d 258 (9th Cir. 1969); *Reed v. United States,* 391 F.2d 4 (9th Cir. 1968); *Rhay v. White,* 385 F 2d 883 (9th Cir. 1967); *Kibert v. Peyton,* 383 F.2d 566 (4th Cir. 1967); *Hansford v. United States,* 365 F.2d 920 (D.C. Cir. 1965); *Jacobs v. United States,* 350 F.2d 571 (4th Cir. 1965); *Dickey v. United States,* 345 F.2d 508 (5th Cir. 1965); *Taylor v. United States,* 282 F.2d 16 (8th Cir. 1960); *Kenner v. United States,* 286 F.2d 208 (8th Cir. 1960); *State v. Davis,* 480 P.2d 354 (Ariz., 1971); *State v. Mahaffey,* 478 F.2d 787 (Wash., 1971).

[10]For example, the Missouri court stated that "We are unable to conclude that as a matter of law an attempt at suicide creates a reasonable doubt as to movant's competency to stand trial." As is manifested by its opinion, the Missouri court made no effort to consider the suicide attempt in light of all of the other evidence, including the statements of petitioner's attorney that the petitioner was not of sound mind to stand trial, the testimony of petitioner's wife and Dr. Shuman's report.

dence casting a reasonable doubt upon Moore's competency to stand trial *as a matter of law*."

Even if it be assumed *arguendo*, however, that prior to petitioner's suicide attempt there was insufficient evidence before the court to raise a reasonable doubt as to his mental fitness, certainly the demented act of attempted self-destruction, in light of and combined with the other evidence, created reasonable doubt *per se* as to petitioner's mental competency (not to mention his physical ability) to proceed with his trial. In fact, it is suggested that petitioner's suicide attempt, standing alone, raised a reasonable doubt and required a psychiatric examination and a hearing.[11]

Suicide or attempted suicide, itself, is substantial evidence of a disordered and confused mind.[12] At the

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[11]The responsibility of the court to guard against the possibility that an accused may have become or may be incompetent does not end when the trial begins. *Pate v. Robinson, supra; Hansford v. United States*, 365 F.2d 920, 925 (D.C. Cir. 1966); *McClain v. Beto*, 328 F. Supp. 636 (N.D. Tex., 1970), *aff'd* 441 F.2d 703 (5th Cir. 1971).

[12]A study by five St. Louis psychiatrists of 134 successful suicides conclude that 94 percent of those persons could be considered psychiatrically ill. E. Robins, E. Murphy, R. H. Wilkinson, Jr., S. Gassner and J. Kaynes, "Some Clinical Considerations in the Prevention of Suicide Based on a Study of 134 Successful Suicides", 49 *American Journal of Public Health*, 888 (1959). Doctors Robert Litman and Norman D. Tabachnick, psychiatrists at the University of Southern California, observe in an article entitled "Psycho-analytic Theories of Suicide", published in *Suicidal Behaviors*, p. 74 (H.C.P. Resnick ed. 1968) that:

> "The final suicidal act is nearly always preceded by a period of increasing psychological crises and emotional conflict during which the potential victim is consciously ambivalent, "mixed up", and confused as he tries to

hearing on petitioner's Rule 27.26 motion, two psychiatrists testified that the fact of attempted suicide alone was enough to call for a psychiatric examination to determine petitioner's mental state. Dr. Shuman stated that in almost every instance, people who attempt suicide are irrational and in need of immediate and definite psychiatric treatment (A. 132-133). Dr. Lum testified that 85 percent of those persons who are bent on self-destruction have true psychiatric disorders and show poor insight and judgment. He further stated that it is likely that such persons are having distortions of reality and irrational thought processes (A. 154). It does not take psychiatric training, however, to enable one to conclude that an attempt at self-destruction is symptomatic of a sick mind. Unquestionably, there was reasonable doubt as to petitioner's competency to participate in his trial with the necessary degree "of rational as well as factual understanding of the proceedings against him". *Dusky, supra* at 402.

Based on the results of this case, one must wonder aloud what type of behavior could ever cause the Missouri courts to doubt a defendant's sanity. This case borders perilously close to being a travesty of justice. It is evident from the record that the trial judge, upset and angry over petitioner's attorney's failure to appear on the morning the case was assigned for trial, allowed his impatience to close his mind to the facts before him and to ignore the repeated exhortations of petitioner's

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control and resist the largely unconscious fantasies and drives which push him toward self-destruction."

And another study by three St. Louis psychiatrists concluded that "Psychiatrically well (normal) persons never or very rarely make suicide attempts, regardless of the severity of the social stresses to which they are subject." E. Robins, E.H. Schmidt and P. O'Neal, "Some Interrelations of Social Factors and Clinical Diagnosis in attempted suicide: A Study of 109 Patients," 114 *American Journal of Psychiatry* 221, 230 (1957).

attorney that petitioner was not competent to stand trial.[13] Since petitioner has been denied his constitutional right to a psychiatric examination and hearing, *Pate* dictates that his judgment of conviction and sentence must be vacated and he must be discharged from custody, unless the State gives him a new trial within a reasonable time.[14]

II.

PETITIONER, ON TRIAL FOR A CAPITAL OFFENSE, WAS DENIED DUE PROCESS BY BEING TRIED AND CONVICTED IN ABSENTIA AFTER HE ATTEMPTED SUICIDE DURING THE COURSE OF HIS TRIAL.

Petitioner's trial began late during the day of June 23, 1969, with commencement of the selection of the jury. On June 24, the jury was finally impaneled, and the prosecution called four witnesses before adjornment that evening. Early the next morning, petitioner was found lying in the back yard of his step-brother's home suffering from a serious gunshot wound of the stomach. He was rushed unconscious to the hospital and underwent surgery that morning, and was again operated on a few days later. In all, he was hospitalized for a total of 21 days (A. 143-48).

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[13]"Constitutional protections are not reserved for good people and denied to bad, nor does competence to stand trial go by the board because the crime charged is serious." *Tyler v. Beto*, 391 F.2d 993, 1003 (5th Cir. 1968).

[14]See also, *Moore v. United States*, *supra* at 666-67; *Clonch v. Boles*, *supra* at 394; *Rhay v. White*, *supra* at 886; *Hansford v. United States*, *supra* at 925-26.

The trial judge was notified within an hour after petitioner was found wounded, but over the strenuous objection of defense counsel, the trial proceeded without the presence of petitioner. The court did not even grant a recess to permit counsel to talk with petitioner's relatives who found him unconscious or to enable him to confer with his client at the hospital. No hearing or even informed inquiry was held to determine the circumstances surrounding the near-fatal shooting of petitioner or to determine whether he had consciously waived his right to be present. The court ordered the trial to proceed forthwith, and the prosecution called four more witnesses, in addition to producing proof of petitioner's prior conviction. At no time was petitioner present to confront these witnesses or to confer with his counsel; nor, of course, did he have an opportunity to take the stand to testify in his own defense.

A. PETITIONER, WHO WAS ON TRIAL FOR AN OFFENSE PUNISHABLE BY DEATH, COULD NOT BE TRIED IN ABSENTIA AND WAS INCAPABLE OF WAIVING HIS RIGHT TO BE PRESENT AT TRIAL.

Before embarking upon a consideration of whether petitioner effectively and competently waived his right to be present at his trial, the threshold question which must be examined is whether in a capital case that right is even waivable. It is submitted that basic principles of constitutional law, as construed and administered by this Court, demand the conclusion that the right of a defendant accused of an offense punishable by death to be present at his trial is so fundamental that it cannot be waived.

The right to be present, to defend oneself, and to confront one's witnesses is scarcely less important than the right of trial itself. It is well-settled that the confrontation clause of the Sixth Amendment is applicable to the States through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400 (1965). In *Pointer,* the Court had the following pertinent observations, *l.c.* 405:

> "[T]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

And in *Illinois v. Allen,* 397 U.S. 337, 338 (1970), it was stated: "[o]ne of the most basic of the rights guaranteed by the confrontation clause is the accused's right to be present in the courtroom at every stage of his trial."

Like most rights, the right to be present may ordinarily be waived – *but not in capital cases. Illinois v. Allen, supra; Diaz v. United States,* 223 U.S. 442 (1912); *Cureton v. United States,* 396 F.2d 671 (D.C. Cir. 1968); *Near v. Cunningham,* 313 F.2d 929, 931 (4th Cir. 1963). The principle has been stated thusly: "The defendant's right to be present during the trial on a capital offense has been held to be so fundamental that it may not be waived by defendant's voluntary absence".[15] This Court, in particular, has long recog-

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[15]Comments of The Advisory Committee on the 1973 Amendments to the Federal Rules of Criminal Procedure upon the suggested revision of Rule 43, as quoted in 8A *Moore's Federal Practice* ¶43.02, at p. 43-44 (2d ed. 1972). Although this case was tried in a state court and the Federal Rules are not controlling, Rule 43 is significant as a codification of existing law. In substance, it dictates that a defendant may not waive his presence in a prosecution for an offense punishable by death.

nized that an accused on trial for a capital offense is not permitted under the law to waive his right to be present at his trial. In *Diaz v. United States, supra* at 445, it was held:

> "In cases of felony our courts, with substantial accord, have regarded [the right to be present] as extending to every stage of the trial, inclusive of the impaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. *And with like accord they have regarded an accused* who is in custody and one *who is charged with a capital offense as incapable of waiving the right;* the one, because his presence or absence is not within his own control, and the other *because, in addition to being usually in custody he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction.*[16]

Even before *Diaz*, the Court had uniformly ruled that in trials for offenses punishable by death the presence of the accused is a non-waivable prerequisite. In *Hopt v. Utah*, 110 U.S. 574 (1883); *Lewis v. United States*, 146 U.S. 370 (1892); and *Ball v. United States*, 140 U.S. 118 (1891), the accused was being tried for a capital offense, and in each instance this Court reversed the conviction because the defendant was absent during a part of his trial. It is noteworthy that the absence of the defendant in those cases was not nearly as prejudicial as petitioner's absence from his trial. Unlike the situation in the case at bar, where petitioner was physically incapacitated and missed the testimony of

[16]Most recently in *Taylor v. United States*, 414 U.S. 17, 19 (1973), this Court reiterated the rule that a defendant on trial for a capital offense was incapable of waiving his right to be present.

five witnesses, in addition to the proof of a prior offense, the charge to the jury, closing arguments, the receipt and announcement of the verdict and the polling of the jury, the defendant in each of the above cases was absent during only a brief period of the trial, and in no instance was any testimony taken without his presence.[17] This Court has *never* upheld a conviction of an accused on trial for a capital offense who has been absent during a major part of his trial.[18]

In addition to the rulings of this Court, the non-waivability of the right to be present has been

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[17]In *Hopt* and *Lewis* the defendant was absent during the challenge of proposed jurors; in *Ball* there was no record of defendant's presence when sentence was pronounced.

[18]*Frank v. Mangum*, 237 U.S. 309 (1915), sustained a conviction for murder where the defendant was absent during the reading of the verdict. The Court held that the Georgia practice of authorizing a defendant to waive his right to be present for the rendition of the verdict, was not unconstitutional. It reasoned that "since that state may, without infringing the Fourteenth Amendment, abolish trial by jury," it may allow a defendant to waive his right to hear the verdict, which "is but an *incident* of the right of trial by jury." However the underpinnings of the *Mangum* decision were dislodged by *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that a trial by jury in criminal cases is a fundamental federal constitutional right which cannot be abolished by the states.

In *Snyder v. Massachusetts*, 291 U.S. 82 (1934), the Court affirmed the murder conviction of a defendant who was not present when the jury viewed the scene of the crime. The Court adhered to its view that an accused has a fundamental right to be present at his trial, but held that a view of the scene of the crime is not a part of the "trial" in the common-law sense.

consistently acknowledged by the state and lower federal courts.[19]

Petitioner was on trial for the offense of rape, which was punishable by death,[20] and the state had not waived the death penalty. He thus bore the "constraint naturally incident to an apprehension of the awful penalty that would follow conviction." *Diaz v. United States, supra* at 455. In trying and convicting petitioner *in absentia*, the Missouri courts stripped him of one of his most fundamental constitutional guarantees.

B. NO MEANINGFUL DETERMINATION WAS MADE THAT PETITIONER VOLUNTARILY AND WILLFULLY ABSENTED HIMSELF FROM TRIAL OR THAT HE COMPETENTLY AND EFFECTIVELY WAIVED HIS RIGHT TO BE PRESENT.

The trial court not only erred by holding that petitioner *could* waive his right to be present, but it

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[19]*Near v. Cunningham*, 313 F.2d 929, 931 (4th Cir. 1963) (which held that "So fundamental is this right that it may not be waived "); *Glouser v. United States*, 296 F.2d 853, 855 (8th Cir. 1961); *Parker v. United States*, 184 F.2d 488, 489 (4th Cir. 1950); *Lee v. Alaska*, 509 P.2d 1088, 1090 (Alaska 1973); *Trombley v. Langois*, 163 A.2d 25, 28 (R.I. 1960); *Blackburn v. State*, 109 So.2d 738, 743 (Ala. 1959); *Berness v. State*, 83 So.2d 607, 611 (Ala. 1953); *Commonwealth v. Ashe*, 70 A.2d 625, 629 (Pa. 1950); *Commonwealth v. Johnson*, 35 A.2d 312, 313 (Pa. 1944); *Commonwealth v. Ashe*, 26 A.2d 211, 212 (Pa. 1942); *People v. La Barbera*, 8 N.E.2d 884 (N.Y. 1937); *Blagg v. State*, 254 P. 506, 508 (Okla. 1927); *State v. Reed*, 210 P. 756. 757 (Mont. 1922).

[20]Petitioner's trial took place in 1969, prior to *Furman v. Georgia*, 408 U.S. 238 (1972). Section 559.260, Mo.Rev.Stat. (set forth in Addendum C, *infra*), provides that every person who shall be convicted of rape shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years.

compounded its disdain for the Constitution by summarily determining, without any evidence, that petitioner's suicide attempt constituted *per se* a voluntary waiver of that right.

When the trial court perfunctorily refused to grant a mistrial or a continuance and decided to proceed with the trial, it held no hearing and made no inquiry whatsoever concerning whether petitioner voluntarily and intelligently intended to relinguish his right to be present. The court was cognizant of petitioner's past psychiatric history, his severe states of depression and anxiety, Dr. Shuman's report, the signed statement and testimony of petitioner's wife that he was mentally sick and needed psychiatric treatment, his attorney's repeated requests for a psychiatric examination of petitioner and his statements that petitioner was not mentally competent to be tried. In addition, the court had been informed of petitioner's suicide attempt and the fact that he was at that very time undergoing emergency surgery (A. 63). Three months after the trial, on petitioner's motion for new trial, the court conducted a hearing regarding petitioner's absence but *not even then did it inquire into petitioner's mental competency to make an intelligent and voluntary waiver.*

To protect and preserve the fairness of the trial process, this Court has imposed strict standards for the determination of whether there has been a waiver of critical trial rights. "Waiver" is equated with "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).[21] A waiver of a fundamental constitutional

[21]See also *Boyd v. Dutton*, *405 U.S. 1 (1972)*; *Brookhart v. Janis*, 384 U.S. 1 (1966); *Glasser v. United States*, 315 U.S. 60 (1942).

right can only be competent and effective if it is made not only voluntarily and willfully, but also "knowingly" and "intelligently." *Johnson v. Zerbst, supra.* Most recently, the Court in *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), reaffirmed its adherence to the *Johnson v. Zerbst* standard in examining waivers of critical trial guarantees: "The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not *unknowingly* relinquished the basic protections that the Framers thought indispensable for a fair trial." *Schneckloth, supra* at 242.

Unquestionably, the right to be present at one's trial, as noted above, is a fundamental constitutional guarantee which is crucial to due process. Even assuming, *arguendo,* that it is susceptible of waiver in a case of this type, such a waiver can be effective only if it is the product of a knowing, intelligent and voluntary choice. Hence, the *Johnson v. Zerbst* standard is fully applicable to determinations with respect to the waiver of that right. *Illinois v. Allen,* 397 U.S. 337, 343 (1970); *Wade v. United States,* 441 F.2d 1046, 1049 (D.C. Cir. 1971); *United States v. Crutcher,* 405 F.2d 239, 243 (2d Cir. 1968), *cert. denied,* 394 U.S. 908 (1969); *Evans v. United States,* 284 F.2d 393, 395 (6th Cir. 1960).

A "knowing" and "intelligent" relinquishment presumes that a person is aware of and understands the right he is discarding, and has a "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748 (1970). "Voluntariness," as recognized by the Court in *Schneckloth,* is difficult of precise definition, but it undeniably connotes the exercise of one's own "rational intellect and free will." *Deese v. United States,* 303 F.Supp. 619, 622 (D.S.C. 1969). A "voluntary" act

necessarily assumes "capacity for conscious choice." *Schneckloth, supra* at 224. Thus, in order for an act to be "voluntary," the individual must be acting free from coercion, mental as well as physical, must be unhampered by mental defects which might impair his ability to exercise his will freely, and must possess the necessary mental capacity for conscious choice.[22]

A waiver of rights cannot be considered voluntary if it is made by a person whose mental condition prevents a knowing, intelligent and meaningful act of volition. This seemingly obvious principle was elucidated in *United States v. Silva*, 418 F.2d 328, 330 (2d Cir. 1969):

> "A confession or waiver of rights cannot be termed voluntary if it is made by a person whose mental condition at the time was such that 'the confession most probably was not the product of any meaningful act of volition.' . . . Once it becomes apparent that the accused's mental condition is a factor that ought to be looked into in relation to the admissibility of his confession, the trial judge must hold a hearing at which relevant evidence may be offered, including the testimony of experts from which the court will decide whether the accused was at the time he confessed so mentally ill that he was unable, with intelligence, knowledge and understanding, to relinquish or abandon a known right or privilege which was his, or whether 'the confession most probably was not the product of any meaningful act of volition'. If it is found that either of these things is so, the confession must be excluded."

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[22]This Court most recently in *Schneckloth, supra* at 227, observed that "the state of the accused's mind" was "certainly" a factor to be evaluated in assessing the "voluntariness" of his actions.

See also, *Pate v. Robinson, supra; Westbrook v. Arizona,* 384 U.S. 150 (1966); *Blackburn v. Alabama,* 361 U.S. 199 (1960).

Neither the trial court, the Missouri Supreme Court on direct appeal, nor the Missouri Court of Appeals in the habeas corpus appeal analyzed petitioner's absence from trial in the light of his mental condition. Yet, the events that transpired before and during petitioner's trial are inextricably intertwined with the issue of his mental capacity to stand trial in the first place. As pointed out above, studies have shown that persons who attempt to take their lives are suffering from severe states of depression impairing their judgment and rationality. In all probability, the mental condition which spawned petitioner's suicide attempt precluded him from making an intelligent, knowing and voluntary decision to absent himself from his trial. At the very least, that probability should have been the subject of meaningful inquiry by the Missouri courts, and before a waiver could be found, there must have been a *clear showing* that petitioner was capable of making a reasoned choice. *Cureton v. United States,* 396 F.2d 671, 676 (D.C. Cir. 1968); *Cross v. United States,* 325 F.2d 629, 631-33 (D.C. Cir. 1963); *United States v. Tortora,* 464 F.2d 1202 (2d Cir. 1972). No court has yet addressed itself to that task.

If petitioner sought to avoid trial, he could have fled the jurisdiction or simply have concealed himself. A bus ride to Potosi would have accomplished the desired result much less painfully than the means chosen. Self-destruction, to a sane person, would seem to be a bit drastic. In view of the entire record of abnormal behavior, no informed determination could have been made as to the voluntariness *vel non* of petitioner's

absence without a psychiatric examination and hearing to determine his mental competency.

The trial court further ignored established constitutional principles by *presuming* that petitioner's absence was voluntary and by imposing the burden upon petitioner to prove otherwise.[23] This *presumption*, which was blessed by the state appellate courts, is wholly repugnant to the requisites of due process. Such a holding defies this Court's teachings that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst, supra* at 464. The presumption against waiver is applicable to the right to confrontation, *Barber v. Page*, 390 U.S. 719 (1968); *Brookhart v. Janis*, 384 U.S. 1 (1966); and to the right to be present. *Illinois v. Allen, supra; Wade v. United States, supra; United States v. Crutcher, supra; Cross v. United States, supra; Evans v. United States, supra.*

The courts below reversed the presumption and then penalized petitioner for failing to sustain a burden of proof which should not have been his to bear. Under the circumstances, the trial court's finding that petitioner voluntarily absented himself for the purpose of avoiding trial was absolutely meaningless.

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[23]See colloquy between petitioner's attorney and the court at pp. 74-75 of the Appendix, and the trial court's ruling on petitioner's motion for a new trial at pp. 102-103.

CONCLUSION

For the reasons stated herein, the judgment of the Missouri Court of Appeals should be reversed and the cause remanded with directions to vacate the conviction and sentence of petitioner and to discharge him from custody unless he is accorded a new trial within a reasonable time.

Respectfully submitted,

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ADDENDUM A

552.020. Lack of mental capacity bar to trial or conviction—psychiatric examination, when, report of —commitment to hospital, when—statements of accused inadmissible, when.—1. No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private physicians to make a psychiatric examination of the accused or shall direct the superintendent of a facility of the division of mental diseases to have the accused so examined by one or more physicians whom the superintendent shall designate. The order shall specify the time, place, and conditions under which the examinations shall be conducted, and shall direct that written reports of the examination be filed with the clerk of the court. The order may include provisions for the interview of witnesses or other physicians and for a commitment of the accused to a hospital or other suitable facility for such time and under such conditions as the court deems necessary for the purpose. If the order specifies commitment to a facility of the division of mental diseases, the examining physician shall not be named in the order.

3. A report of the psychiatric examinations shall include:

(1) Detailed findings;

(2) An opinion as to whether the accused has a mental disease or defect, and the duration thereof;

(3) An opinion as to whether the accused, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;

(4) An opinion as to whether at the time of the alleged criminal conduct the accused as a result of mental disease or defect did not know or appreciate the nature, quality or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law;

(5) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination by the court of the issue of mental fitness to proceed; and

(6) A recommendation as to whether the accused, if found by the court mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within five days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing and at their own expense. If such examination is ordered, a report of the examination made by the examining physician shall be furnished to the court and to the opposing party.

5. If the psychiatric report contains the recommendation that the accused should be held in custody in a

suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admited to bail, or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. If neither the state nor the accused nor his counsel contests the opinion referred to in subsection 3, subdivision (3), of this section relative to fitness to proceed, the court may make a determination and finding of record on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and cross-examine the physicians who rendered such opinion and to offer evidence upon the issue.

7. If the court determines that the accused has mental fitness to proceed and does not admit the accused to bail, or release him on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending further proceedings. If the court determines that the accused lacks mental fitness to proceed, the proceedings against him shall be suspended and the court shall commit him to the custody of the director of the division of mental disease for so long as the unfitness endures or until the charges or proceedings are disposed of according to law. The committed person shall be entitled to the writ of habeas corpus upon proper petition to the court which committed him. The issue of his mental fitness to proceed after such a commitment may also be raised by a motion filed by the director of the division of mental

diseases or by the state, alleging the mental fitness of the accused to proceed. A psychiatric report relating to the issue of the accused's mental fitness to proceed may be attached thereto. If the motion is not contested by the accused or his counsel or if after a hearing on the motion the court finds the accused mentally fit to proceed, or if he is ordered discharged from the director's custody upon a habeas corpus hearing, the criminal proceedings shall be resumed. If, however, the prosecuting or circuit attorney determines that so much time has elapsed since the commitment of the accused that it would be unjust to resume the criminal proceedings, the court may dismiss the charge.

8. If the charges against any accused person are dismissed either by the state or by the court and if he is then in custody of the director of the division on mental diseases, he shall not be retained in such custody or in any hospital unless proper proceedings have been instituted and held as provided in sections 202.780 to 202.875, RSMo, in which case these sections and no others shall be applicable to his continued retention, hospitalization and discharge.

9. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any physician or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceedings then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the

ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such findings by the court be introduced in evidence on that issue nor otherwise brought to the notice of the jury.

ADDENDUM B

27.26 Sentence Unlawful–Motion to Vacate or Correct–Forum and Scope of Motion–Notice to Prosecuting Attorney–Appointment of Counsel–Hearing–Order–Effect of Order–Appeal. A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and the laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) Nature of Remedy. This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) When Remedy May Be Invoked.

(1) The provisions of this rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within such an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) Form and Sufficiency of Motion. A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence. The prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) Successive Motions. The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) Hearing. As soon as a motion hereunder is received by the circuit clerk, he shall notify the

prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. "Prompt" means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) Burden of Proof. The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) Presence of Prisoner. The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) Right to Counsel. If a motion presents questions of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motion filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner whether he has included all grounds known to the prisoner as a basis for attacking the judgment and sentence and to amend the motion to include any claims not already included. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

(i) Judgment. The court shall make the findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(j) Appeal. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the State. An appeal may be taken from the order entered on the motion as in a civil case as authorized by §512.020, RSMo 1959, V.A.M.S. Appellate review shall be limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous.

(k) Costs. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal *in forma pauperis* and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court of a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) Counsel on Appeal. If a prisoner desires to appeal and contends he is without means to employ counsel to

perfect the appeal, the trial court, if satisfied that the prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

ADDENDUM C

559.260. Rape, punishment.—Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6036

JAMES EDWARD DROPE,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS,
ST. LOUIS DISTRICT

BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6038

JAMES EDWARD DROPE,
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STATE OF MISSOURI,
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ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS,
ST. LOUIS DISTRICT

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Missouri Court of Appeals, St. Louis District, affirming the denial by the Circuit Court of the City of St. Louis, Missouri, of the petitioner's motion for post-conviction relief under Missouri Supreme Court Rule 27.26, V.A.M.R., is reported as follows: *James Edward Drope* v. *State of Missouri*, 498 S.W.2d 838 (Mo.Ct.App. at St.L. 1973). The opinion is reprinted in the Appendix at pages 216-225. An appendix to the opinion is reprinted at pages 8-13 of the Appendix.

JURISDICTION

Having been denied transfer of the final judgment entered by the Missouri Court of Appeals, St. Louis District, as reflected in the above opinion, to the Supreme Court of Missouri, the petitioner invokes the jurisdiction of this Court to review the final judgment entered, denying him post-conviction relief, pursuant to 28 U.S.C. § 1257(3) (1970).

QUESTIONS PRESENTED

1. Is the finding that the trial court had not had "reasonable cause to believe" that the petitioner was suffering from "a mental disease or defect excluding fitness to proceed" at the time of petitioner's original trial clearly erroneous?

If it is determined that that finding is not clearly erroneous, the petitioner's contention that his constitutional rights were violated when the trial was continued in his absence presents nothing for this Court to review.

STATUTES INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

The case also involves Sections 552.010, 202.700, 552.020, 552.030 and 559.260 of the Missouri Revised Statutes of 1969.

Also involved is the Missouri Supreme Court Rule 27.26, V.A.M.R.

28 U.S.C. § 1257(3) (1970) is likewise involved, as is 28 U.S.C. § 2254 (1970).

The text of the constitutional provisions, statutes and Missouri Rule involved are set forth in an appendix to this brief.

STATEMENT

On June 25, 1969, the petitioner was convicted of forcible rape in the Circuit Court of the City of St. Louis, Missouri and, on July 21, 1969, it was the judgment and sentence of that court that the petitioner be imprisoned for the remainder of his natural life. The judgment was affirmed on petitioner's appeal to the Supreme Court of Missouri from that conviction. *State* v. *Drope,* 462 S.W.2d 677 (Mo. 1971) (A. 107-118). What is material to the consideration of the questions presented this Court as reflected by the record of petitioner's trial and the ultimate affirmance of the judgment of conviction is outlined below.

On February 20, 1969, as requested by petitioner's trial counsel, Mr. Lester Watson, Joseph S. Shuman, M.D., performed a psychiatric evaluation of the petitioner. That evaluation was reduced to writing in a letter to Mr. Watson from Dr. Shuman dated February 22, 1969, and is reproduced in the Appendix at pages 8-13. It was Dr. Shuman's impression that "abnormal sexual acts" were part of petitioner's "own culture" (A. 12). The doctor did not find "any strong signs of psychosis" but indicated that the petitioner needed "the aid of a psychiatrist" at the time of the evaluation. The doctor offered the following diagnosis: "(1) Psychopathic personality disorder, sexual perversion. (2) Borderline mental deficiency. (3) Chronic anxiety reaction with depression."

On February 26, 1969, an indictment was returned in the Circuit Court for the City of St. Louis, Missouri, charging the petitioner with the rape of his wife (A. 6). On April 14, 1969, the petitioner had the cause continued to May 26, 1969 (A. 1). On May 27, 1969, a copy of Dr. Shuman's letter-report was attached to what was called a "Motion for Continuance" filed by Mr. Watson on behalf of the petitioner seeking to continue the case "until September, 1969 in order that he [the petitioner] might receive an examination, evaluation and psychiatric treatment, as suggested by Dr. Shuman" (A. 7).

On June 23, petitioner's case was assigned to Division No. 19 of the Circuit Court for trial (A. 1). The petitioner, who had been freed on bond, appeared for the trial as required but Mr. Watson did not appear and had to be summoned from the Circuit Court of the County of St. Louis, Missouri (A. 15, 17). From the record established upon Mr. Watson's appearance in court on the afternoon of June 23, 1969, it appears that the petitioner's "Motion for Continuance" had been considered by the assignment judge, the Honorable Casey Walsh, and Mr. Watson was told that the motion was not in proper form and that if Mr. Watson was seriously contending that the petitioner needed psychiatric help, a proper motion should be filed. The record indicates that Mr. Watson was aware that he was to file "an additional form" to invoke the procedures of Section 552.030, RSMo 1969, to obtain a psychiatric examination of the petitioner (A. 16). Seemingly, however, Mr. Watson was confused as to when the case had been reset for trial (A. 15-21).

Mr. Watson objected to going to trial on June 23, 1969 on the grounds that, *inter alia*, "the defendant [petitioner] is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" (A. 19).

The testimony of Marianne Joyce Drope, the petitioner's wife, describes in detail how the offense with which the petitioner was charged occurred (A. 22-40). After the rape occurred, she and the petitioner did live together as husband and wife for a time but, as she stated, it was "[b]ecause he was trying to make me—make out he wasn't well . . . and when he went to the psychiatrist and I talked to him, he says it would be best if we would try to get along together, that he thought he would be all right. But he said he would go on and go to work, try to take care of the children. That is what I wanted,—my children taken care of" (A. 41).

Seemingly, Mrs. Drope discussed her husband's case with Mr. Watson on February 12, 1969 (A. 45-46). She agreed with Mr. Watson that it would be best for her to accompany the petitioner to see a psychiatrist. She and her husband went to see Dr. Shuman and the doctor told her that her husband had some problems. She testified that on occasion her husband would roll down a stairway when he didn't get his way or was worried about something (A. 47). During the ten years prior to trial, she had seen him roll down stairs about three or four times at the most (A. 59-60). After rolling down stairs, he would not black out but would get right up, start walking around and say he was all right (A. 61-62). To her knowledge, the petitioner had never had a blackout during the seven years of their marriage (A. 58). During her discussion with Mr. Watson on February 12, 1969, Mrs. Drope executed a written statement to the effect that she believed the petitioner was "suffering from a mental condition" and should receive psychiatric treatment for it (A. 56, 46). On that date she thought it was possible that the petitioner was mentally sick (A. 50). However, asked "Weren't you convinced that he [the petitioner] was sick after talking

to Doctor Shuman?" She replied, "No, sir" (A. 50). Mrs. Drope did not know if petitioner did a lot of drinking but at the time of the rape, he and the others charged with the crime smelled of liquor (A. 62). She had decided to pursue the prosecution of her husband because he had recently tried to choke and kill her (A. 52).

The evidence of the petitioner's physical and nervous condition was admitted by the trial court on the defense proposition that the petitioner was physically incapable of doing the things Mrs. Drope said he did in committing the rape as a result of that condition (A. 51). Mrs. Drope however testified that her husband had not lost any jobs because of his nervous condition to her knowledge (A. 43).

The petitioner was present in court with his counsel, Mr. Watson, throughout the trial proceedings which occurred on June 23 and 24, 1969, but failed to appear for trial on June 25, 1969 (A. 2, 62). The record of what occurred in court on the morning of June 25, 1969, indicates that Mr. Watson moved "for a mistrial in view of the fact that the defendant [the petitioner] . . . shot himself this morning" (A. 63). Mr. Watson complained to the trial court about the difficulty of going to trial without that petitioner and the court replied that that difficulty was brought about by the petitioner who was on bond and had a responsibility to be present. The trial court thus overruled the motion for a mistrial.

At the close of the state's case, the petitioner, through Mr. Watson, moved for a "verdict of acquittal," stating in part:

> "The Court should have declared a mistrial when Defendant [petitioner] moved for same, when it became apparent that the Defendant [petitioner] shot himself and could not further attend the trial as he is

confined as a Patient in the City Hospital of St. Louis No. 1, therefore depriving him of being confronted by his accusers as he is being tried in absentia" (A. 64).

The jury returned a verdict finding the petitioner guilty of rape and the trial court assessed the punishment at life imprisonment (A. 65-67). Thereafter, the petitioner, through Mr. Watson, filed his "Motion for a New Trial" (A. 67-69). Ten paragraphs of that motion in some way attack the jury's verdict on the ground that the petitioner was absent during a part of the trial: paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11 and 12. The petitioner testified at a hearing on his new trial motion before the trial court on September 19, 1969 (A. 71). In essence, his testimony concerned his absence from trial on June 25, 1969. On the morning of that date, he testified that he went to his brother's house, was told by his mother to get a change of clothes and went down into the basement to do so, got the clothes, turned out the light and the next thing he remembered was being in the hospital (A. 72).

"Q. . . . [By Mr. Watson] Now, Mr. Drope, did you on that date take a gun and deliberately shoot yourself that you know of?

"A. I don't remember a thing. It happened after I turned the light out.

"Q. Did you do anything to prevent you from coming into this courtroom to attend your trial?

"A. No, sir" (A. 73).

After the petitioner's direct examination, the hearing was continued to October 3, 1969. At the continued hearing, the state cross-examined the petitioner who did not recall going to the garage on the morning of June 25, 1969 (A. 77). However he did remember being hit by "something hot" in his stomach. Seemingly he remembered nothing

after that until after coming to in the hospital after he had been operated on.

The state introduced police records to indicate that there was a report made at 8:16 a.m. that the petitioner had shot himself on June 25, 1969 (A. 85). The report was prepared by Patrolman Jerome Dampier (A. 86).

The hospital records of petitioner's admission on June 25, 1969, indicate that he was conscious but nervous and that he made a statement to the doctor that he had shot himself with a .22 caliber in the alley because of some problem with the law (A. 90-91).

Patrolman Jerome Dampier investigated the incident which caused the petitioner to be admitted into the hospital on the morning of June 25, 1969 (A. 94-95). He checked the garage in which the petitioner supposedly shot himself and later talked to the petitioner at the hospital (A. 95-96). At the time Patrolman Dampier talked to him, the petitioner was lying on a stretcher out in the hall of the Emergency Room.

"Q. (Mr. Frank) Officer, at that time did the defendant [the petitioner] make a statement to you?

"A. Yes, he did.

"Q. What did he say to you?

"A. He said he was supposed to go to court for rape, and he didn't do it; he [would] rather be dead than to go to trial for something he didn't do. So he got his rifle out of his basement and went to the garage and shot himself.

"Q. Did he at any time when he was talking with you mention the word 'blackout', that he couldn't remember how he was shot?

"A. No, sir, he didn't" (A. 97).

Before talking with the petitioner, Patrolman Dampier gained permission to do so from the doctor, was told the petitioner's condition was not critical and that he could be interviewed (A. 97-98).

Thereafter, on October 15, 1969, the trial court overruled petitioner's motion for new trial and filed a memorandum in connection therewith in which it is stated:

> "The court finds from the evidence that the absence of the defendant [petitioner] was due to his own voluntary act in shooting himself; done for the very purpose of avoiding trial . . ." (A. 103).

On his direct appeal to the Supreme Court of Missouri, the petitioner raised two questions which are of importance here. As stated by the Missouri court, those questions were (1) whether "the court erred in proceeding with the trial when he [the petitioner] was absent," and whether "there was 'no evidence upon the record' that he [the petitioner] voluntarily absented himself from the trial" (A. 110; *State* v. *Drope, supra,* 462 S.W.2d at 680); and (2) whether "the refusal of the trial court to grant a continuance 'to procure additional psychiatric evaluation' was error" (A. 116; *id.* at 684).

The Missouri Supreme Court decided these issues against the petitioner. At the time of his trial, the petitioner was free on bond and for that reason his absence from trial could be presumed voluntary. That presumption aside, however, the circumstances of the petitioner's absence were presented to the trial court which found from the evidence that the petitioner had voluntarily absented himself and the higher state court gave deference to that finding and conclusion. Thereafter, the Missouri Supreme Court, in essence, found that, as the petitioner had voluntarily absented himself from his trial, it was not

error for the trial court to continue the trial without him. Finding that its conclusion was in accord with the general rule applied by other state and federal courts, the state court stated:

> ". . . [T]he absence of the defendant [petitioner] resulted from an intentional act by him done for the express purpose of preventing his presence at the trial, and we conclude such act constituted a waiver of defendant [petitioner] to his right to be present" (A. 114; *id.* at 682).

Later, the Missouri court addressed the fact that the petitioner was charged with a capital offense:

> "We note that this is a capital case, that the record does not show a waiver of the death penalty, but that capital punishment was not imposed. Some authorities seem to distinguish between a waiver of the right to be present in capital cases and in felony cases generally. . . . However, . . . there is no logical basis for the distinction absent a statute or rule on the matter. The State is interested in all felony prosecutions, and it is as much the duty of the courts in the prosecution of felony cases generally to protect the liberty of accused persons as it is their duty to protect the rights of one accused of a capital offense. . . ." (A. 116; *id.* at 683-684).

After outlining the circumstances concerning the continuance sought by Mr. Watson to obtain a psychiatric evaluation of the petitioner prior to trial, the Missouri Supreme Court stated:

> "In the argument in his brief defendant [the petitioner] seems to base his contention that error resulted in denying the request for a continuance on the

> basis that additional psychiatric care would take substantial time, and that the time was needed to prepare for trial. There is no contention in the brief that defendant [the petitioner] did not have the mental capacity to proceed with the trial" (A. 117; *id.* at 684).

The state appellate court then ruled that the record before it did not demonstrate an abuse of discretion in refusing to grant the continuance.

On April 22, 1971, the petitioner filed a motion pursuant to Missouri Supreme Court Rule 27.26 [hereinafter referred to as Rule 27.26] to vacate his judgment and sentence in the Circuit Court of the City of St. Louis, Missouri (A. 4). As required by the rule, the motion was filed in the sentencing court. A hearing on the motion took place on July 21, 1971. On June 26, 1972, the motion was overruled. The petitioner appealed to the Missouri Court of Appeals, St. Louis District, on July 7, 1972. On March 5, 1973, petitioner's cause was argued and submitted to that court (A. 5). On June 5, 1973, the Missouri Court of Appeals, St. Louis District, filed an opinion upholding the overruling of appellant's Rule 27.26 motion. Subsequently, the petitioner timely took the appropriate procedural steps to have the cause reheard or transferred to the Supreme Court of Missouri but to no avail. It is the respondent's position that very little of the evidence elicited at the Rule 27.26 hearing illuminates, clarifies or is material to the questions presented this Court. However, the respondent will outline below the evidence adduced at the hearing which will contribute to the discussion contained in the argument portion of this brief. Also outlined below are the findings and conclusions of the sentencing court and the Missouri Court of Appeals, St. Louis District.

The petitioner's first witness at the Rule 27.26 hearing was Joseph F. Shuman, who qualified himself as an

expert in psychiatry (A. 128-129). He had examined the petitioner approximately four months prior to the original trial, on February 20, 1969, for about an hour and a half and had made a written letter-report of that examination which is contained in the Appendix at pages 8-13. The witness, a medical doctor, agreed with petitioner's counsel that "psychiatrically well persons never or rarely make suicide attempts" (A. 132). The petitioner also elicited the following testimony:

> "Q. Doctor, based upon your knowledge in the field of psychiatry, your educational and practical background, do you have an opinion as to whether or not a person who attempts a suicide, whether or not that act of attempted suicide would be reasonable cause to believe one might not be mentally competent at that time to understand, say, the proceedings around him, if he was in the midst of a trial?
>
> "A. This is a possibility.
>
> . . .
>
> "Q. I am asking, is there reasonable cause to believe that though?
>
> "A. There is reasonable cause" (A. 133-134).

On cross-examination, the doctor was asked a question which hypothesized the factual situation involved in the petitioner's case, and which asked him if in such a situation a man in the petitioner's position could deliberately, wilfully and voluntarily shoot himself to get his trial continued (A. 134). The doctor replied that it was "certainly a possibility." On February 20, 1969, at the time the doctor made his examination of the petitioner, he found the petitioner to be free from psychosis (A. 134). Although the petitioner was not very responsive and was very nervous, the doctor found him to be fairly cooperative and

able to answer judgment questions without any trouble (A. 134-135). The report written by the doctor leaves the impression, which the doctor felt was certainly true, that the petitioner's anxiety was intensified because of the legal proceedings against him (A. 136). The doctor's report does not indicate that the petitioner was unable to understand court proceedings or to aid and assist his counsel (A. 136-137).

On re-direct examination, the doctor indicated that as a psychiatrist, given the facts surrounding the petitioner's case, he would have had reasonable cause to believe that the petitioner was mentally incapable of proceeding at the time the petitioner shot himself in the stomach (A. 138). The following testimony was also elicited:

> "Q. One of your conclusions was that he [the petitioner] had a chronic anxiety reaction with depression. Could you explain a little bit about what that means?
>
> "A. That means the patient is markedly anxious and intense, not for one day but for a long period.
>
> "Q. Psychiatrically speaking, a man in this condition, could his judgment be impaired in any way, could his reason be impaired?
>
> "A. His reason I feel would be impaired. Are judgment and reason synonymous?
>
> "Q. Only if you think they are.
>
> "A. I think his judgment would certainly be affected by his condition. I guess that would be slightly impaired, but not completely impaired" (A. 139).

Norma Snowden, the next witness, was used to introduce records of the petitioner's admission into the hospital on June 25, 1969. The records indicate that the petitioner signed a consent to operation form (A. 148).

The next witness, Dr. Jon Tek Lum, was a psychiatrist who was familiar with Chapter 552 of the Missouri statutes (A. 149-151). Under questioning, the doctor gave the following opinion on the situation which occurred at petitioner's trial:

> "A. I feel that a man that has committed an act such as raping his own wife, or allegedly raping his own wife, and then afterwards during the trial, in the process of the trial, makes a suicide attempt is in need of at least a psychiatric evaluation to find out his mental condition" (A. 151).

On cross-examination, the doctor stated that in his opinion the petitioner had made a suicide attempt by shooting himself (A. 155). Of the people who make suicide attempts, eighty-five percent of them have, for example, a chronic depressive illness or suffer from alcoholism (A. 159). The remaining fifteen percent suffer from character disorders, schizophrenia or organic brain problems. If a person deliberately shot himself not to commit suicide but to achieve any other result, the doctor would say that that person had a psychiatric problem (A. 160).

The petitioner also introduced the testimony of his half-brother, Homer Elmer Case, Jr., and his ex-stepfather, James McCleary. None of this testimony seems relevant to the questions presented this Court.

The petitioner also testified in his own behalf (A. 178). Much of the petitioner's testimony is directed to the issue of whether he was rendered the effective assistance of counsel by Mr. Watson, an issue he has abandoned in this Court. Nevertheless, the testimony does illuminate to some extent the petitioner's capacity to understand the proceedings against him and to assist in his own defense and, therefore, is summarized below. Mr. Watson was

retained to represent the petitioner by the petitioner's mother (A. 179). Watson talked with the petitioner's wife and arranged for the examination made by Dr. Shuman (A. 180). The petitioner indicated that Mr. Watson only talked vaguely with him about the facts and circumstances of the alleged offense (A. 181). At some point either prior to trial or during trial, the petitioner's attorney, the prosecuting attorney and the trial judge went into chambers for a conference (A. 182). When Mr. Watson came out of the conference, he advised the petitioner to plead guilty and take a ten-year sentence. The petitioner at that time replied that he was not guilty and could prove it, that he would have his witnesses ready for his defense, and told Watson just to make sure that the witnesses were put on the stand. Watson told the petitioner to be sure and have the witnesses ready for trial and the petitioner assured Watson that he would. At the time of the trial, the petitioner was taking some medication (tranquilizers) he had received from Dr. Shuman because he was so nervous and because he could not make sense out of what was occurring in the courtroom (A. 183).

The sentencing court filed its "Statement of Facts, Conclusions of Law and Order" overruling the petitioner's Rule 27.26 motion on June 26, 1972 (A. 197-213). As required by Rule 27.26, the sentencing court found it was precluded from considering the issue of whether it was constitutional error to proceed with trial in the absence of the petitioner (A. 200). The court noted that at no time—prior to, during or after trial or on appeal—had the petitioner raised the contention that he was mentally incapable of proceeding with trial. Dr. Shuman's report indicated that the petitioner was "well oriented in all spheres," able to answer judgment questions without trouble, showed no strong signs of psychosis, and had a culture of sexual

perversion, all of which failed to indicate that the petitioner could not understand the proceedings against him or was incapable of cooperating with counsel (A. 200-201). Although petitioner's trial counsel contended that the petitioner was not of sound mind and should undergo psychiatric evaluation, counsel made no statement and in no way contended that the petitioner was mentally unfit to proceed.

There was no evidence brought out during the course of the trial upon which a lay person could conclude that the petitioner was unable to understand the proceedings against him or assist his counsel. Nor had the petitioner acted in any way during his attendance at trial to cause one to reach such a conclusion. No previous conduct or history of mental illness was brought to the court's attention at trial.

Mr. Watson, the petitioner's trial counsel, seemed familiar with the provisions of Chapter 552 of the Missouri statutes and was apparently satisfied that the petitioner had no viable defense under that chapter (A. 202).

> "The mere fact that he [Mr. Watson] stated that his client [the petitioner] was mentally sick is no evidence that Mr. Drope was mentally sick. It has been the experience of the trial courts here that motions for psychiatric examinations have often been made merely for the purpose of delay. It is estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent" (A. 202).

The sentencing court considered the testimony of the two psychiatrists at the hearing on petitioner's motion under Rule 27.26 and found that Dr. Shuman's was "speculative and based merely on possibilities" and that Dr.

Lum's merely indicated that a person who attempted suicide should be evaluated psychiatrically to determine why he did it (A. 203).

The sentencing court found that there was no evidence to indicate that the petitioner was incapable of cooperating with his trial counsel and no credible evidence to suggest he could not understand the proceedings (A. 208).

The court noted that the petitioner did not testify at the Rule 27.26 hearing that he had attempted to commit suicide. The petitioner's testimony that he did not know how he came by his bullet wound on June 25, 1969 was found unbelievable by the court. It added:

> "The fact that Mr. Drope shot himself to avoid trial suggests very strongly an awareness of what was going on. He had heard his wife testify to the facts of the crime and had heard two witnesses testify to his admissions and hence was very much aware of, not only the proceedings, but what he had done and the probable consequences. A person does not defend himself against that which he is not aware of or does not know of. His shooting himself was to avoid the consequences" (A. 208-209).

The opinion of the Missouri Court of Appeals, St. Louis District, upholding the sentencing court's determination on petitioner's motion under Rule 27.26 was filed on June 5, 1973. That court found that the two questions presented this Court were "inextricably woven together" (A. 218; *Drope* v. *State, supra,* 498 S.W.2d at 841).

After analyzing the factual circumstances and the constitutional concepts and Missouri statutes involved, the appellate court felt that it had to determine whether the petitioner's rights concerning his mental competency to

stand trial were violated "at three different times—before the trial, during the trial after the suicide attempt, and at the time of the motion for new trial" (A. 220; *id.* at 842). Only Dr. Shuman's report was before the trial court prior to trial. That report was analyzed in detail by the state appellate court and was found not to raise "a reasonable doubt of Drope's fitness to proceed" (A. 220-221; *id.*).

With regard to the second time period under consideration—during trial—the St. Louis appellate court, after considering the practicalities of the situation, stated:

> "We therefore hold that it was within the discretion of the trial court, if he became aware of doubts of competency during the trial, to delay ordering *sua sponte* an examination and hearing until the close of the case" (A. 221-222; *id.*).

With regard to the third time period—after the trial was over but prior to sentencing—the appellate court assumed that the petitioner's act of shooting himself was "in fact a bona fide attempt at suicide," accepted that that act to Dr. Shuman and Dr. Lum "would raise a reasonable doubt as to a man's competency to proceed with trial," but noted that the two doctors did not state that such an intent "established incompetency to proceed but only raised in their expert opinion a doubt," and stated:

> "At the time judgment was finally entered and sentence imposed against Drope, the court had before it the pre-trial psychiatric report and the fact of an attempted suicide, and evidence that that attempt was to avoid trial. We are unable to conclude that as a matter of law an attempt at suicide creates a reasonable doubt as to the movant's competency to stand trial. . . and the expert medical opinion of psychiatrists of such doubt cannot be imputed to a trial judge where

such expert opinion is not before him. The procedures employed for protecting Drope's rights were not shown by movant to be inadequate. We cannot hold the finding of the trial court regarding defendant's [petitioner's] competency to be clearly erroneous" (A. 222-223; *id.* at 843).

The second question now raised by the petitioner before this Court was also presented to the Missouri Court of Appeals, St. Louis District, as the petitioner there alleged that he was denied due process when his trial continued in his absence (A. 216; *id.* at 839-840). The St. Louis appellate court noted that the Supreme Court of Missouri had determined on petitioner's direct appeal that his act of shooting himself was a voluntary act, done for the purpose of avoiding trial and thus constituted a waiver of his right of confrontation (A. 223; *id.* at 843). As to the petitioner's contention that his absence from trial was a result of his mental problem, it should be recalled that the appellate court had previously emphasized that the two psychiatrists had not testified that an attempt at suicide would establish incompetency to proceed but only raise a doubt of incompetency in their expert opinion. The court added:

> "The psychiatric testimony at the 27.26 proceeding that such an attempt [at suicide] might have been the product of a lack of competency does not meet the burden of proof placed upon movant [under Rule 27.26]. Again we cannot hold the trial court's finding to be clearly erroneous" (A. 223; *id.* at 843).

SUMMARY OF ARGUMENT

The Missouri Court of Appeals, St. Louis District, correctly applied the doctrine delineated by this Court in

Pate v. *Robinson*, 393 U.S. 375 (1966) as the determination by the sentencing court on the petitioner's motion under Missouri Supreme Court Rule 27.26 that the facts and evidence in this case did not provide the trial court with reasonable cause to believe that the petitioner was suffering from a mental disease or defect excluding fitness to proceed at any time before or during the course of petitioner's trial or prior to announcing judgment and sentence so as to require the trial court to cause the petitioner to undergo psychiatric examination and, if the results thereof were contested, to hold a competency hearing pursuant to Missouri law is not clearly erroneous. Furthermore, the petitioner's act of shooting himself in the stomach between the second and third days of trial under the evidence in this case was a voluntary one, done for the specific purpose of avoiding being present at trial and was insufficient in and of itself to require a *Pate*-dictated competency hearing or the Missouri equivalent.

The constitutionality of continuing the petitioner's trial in his absence after he had shot himself and caused his hospitalization was determined, adversely to the petitioner's position, by the Supreme Court of Missouri on his direct appeal and was not a question open to the Missouri Court of Appeals, St. Louis District and, hence, is not before this Court. The only issue open to the Missouri Court of Appeals, St. Louis District, in connection with the above question was whether the petitioner's absence from trial was involuntary in that shooting was the result of mental incompetency and that issue was correctly decided by the state appellate court when it held that the finding of the sentencing court that the petitioner had not proved his absence was the product of mental incompetency is not clearly erroneous.

ARGUMENT

I.

The Finding That the Facts, Circumstances and Evidence In This Case Did Not Raise a Bona Fide Doubt of the Petitioner's Competency to Stand Trial So As to Require the Trial Court to Sua Sponte Convene a Competency Hearing Is Not Clearly Erroneous.

The respondent, the State of Missouri, concedes the conviction of a legal incompetent violates both federal and state concepts of due process and that its procedures must be sufficient to protect against the violation of those concepts. An accused must be able to both factually and rationally understand the proceedings against him and "to consult with his lawyer with a reasonable degree of rational understanding" before he is required to withstand the rigors of a criminal prosecution. *Dusky* v. *United States*, 362 U.S. 402 (1960). Or, to otherwise phrase the rule as the Missouri legislature chose to do, it can be said:

> "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures."

Section 552.020 (1), RSMo 1969. Whenever a *bona fide* doubt is raised that an accused lacks the rational abilities of the *Dusky* rule, the court must, on motion or *sua sponte*, convene a competency hearing to determine whether the accused is capable of standing trial. *Pate* v. *Robinson, supra*. The *Pate* rule is codified in Missouri where "*bona fide* doubt" is translated into "reasonable cause." Section 552.020 (2), RSMo 1969. Undoubtedly,

there is nothing of constitutional significance lost in the translation. *See Miller* v. *State,* 498 S.W.2d 79, 83 n. 1 (Mo.Ct.App. at K.C. 1973).

The term "mental disease or defect" is one of art and a Missouri statute provides an open-ended definition of it. Section 552.010, RSMo 1969. However, an abnormality manifested only by "antisocial conduct" or "criminal sexual psychopathy" is not included within the term. The petitioner does not contend that Missouri's statutory scheme, including whatever restrictions brought about by the definition of "mental disease or defect," was or is inadequate to protect his due process rights.

In a motion under Rule 27.26, the petitioner put to issue whether, at any time during the course of the proceedings at his trial, the court should have had "reasonable cause" to believe that he was suffering from a "mental disease or defect" excluding fitness to proceed so as to require the court under Section 552.020 to cause the petitioner to be psychiatrically examined and, if the findings of the examination were contested, hold a hearing on his mental fitness to stand trial. Under the terms of that rule, the petitioner had the burden of convincing the sentencing court on the issue by the preponderance of the evidence and the Missouri Court of Appeals, St. Louis District, the court to which this Court's writ of *certiorari* is taken could not overturn the findings of the sentencing court on the issue unless it was able to declare that finding "clearly erroneous." Rule 27.26 was specifically designed by the Supreme Court of Missouri to provide a valuable post-conviction remedy and not to provide another direct appeal where the state's burden is considerably greater. If the rule is to retain that position and the state-federal relationship is to remain in proper balance, this Court must

accept the limitations placed on proceedings under the rule in considering this writ.

The question of whether the sentencing court considering the Rule 27.26 motion committed clear error with regard to the *Pate* issue is essentially one of fact and the weight to be given certain facts. What the court at petitioner's trial had before it, relevant to this issue, was (1) Dr. Shuman's letter-report, (2) the actions of Mr. Watson, (3) Mrs. Drope's testimony and (4) the petitioner's act of shooting himself.

There is nothing in Dr. Shuman's report to indicate to the trial court that the petitioner was incapable of understanding the proceedings against him or assisting in his own defense. The petitioner was "well oriented in all spheres," could answer judgment questions *"without trouble,"* displayed no psychosis, possessed a culture which included "abnormal sexual acts" (A. 8-13). The diagnosis of the doctor contained in the report was correctly analyzed with reference to Chapter 552, RSMo 1969, the adequacy of which is not at issue, by the Missouri Court of Appeals, St. Louis District:

> "The conclusions [of Dr. Shuman] are that Drope is (1) sociopathic—a synonym for anti-social which is specifically exempted as a mental disease or defect under Missouri law; (2) sexually perverted—again exempted; (3) borderline mental deficiency—but no indication it is severe enough to prevent cooperation and understanding, and the report indicates the contrary is true; (4) chronic anxiety reaction with depression—treated by the doctor with tranquilizers and again indicated as not interfering with Drope's understanding or cooperation and explained as based in part on his legal troubles" (A. 220; *Drope* v. *State, supra,* 498 S.W.2d at 842).

Although Dr. Shuman did not provide an opinion in his report as to whether the petitioner was capable of standing trial, when Missouri law is correctly applied, his report would have supported an opinion in the affirmative. Therefore, even though Dr. Shuman indicated that the petitioner was in need of the aid of a psychiatrist, he seemingly did so on a diagnosis which fails to provide any basis for doubting the petitioner's capability to cooperate in and understand legal proceedings.

Under all the facts and circumstances, it is clear that Mr. Watson, the petitioner's trial counsel, did not seriously and sincerely believe that his client lacked the mental capacity to assist in defense of the rape charge or to comprehend what was occurring at trial. Beyond obtaining the report from Dr. Shuman, filing a "Motion for Continuance" and arguing against going to trial because of that motion, and eliciting testimony from Mrs. Drope concerning her husband's "nervous condition" for the purpose of demonstrating that he was physically incapable of committing the acts of which she complained, Mr. Watson did nothing to advance a theory that the petitioner was suffering from a "mental disease or defect" excluding responsibility and, at no time, did he contend that the petitioner was suffering from a "mental disease or defect" excluding fitness to proceed. Specifically, on no occasion did he confront the trial court with a complaint as to the cooperation he was receiving from his client or as to his client's ability to understand and assist. The now much vaunted motion was on its face nothing more than an attempt by Mr. Watson to delay the trial. The alleged need of psychiatric evaluation and treatment was no more than a ground on which to base the motion. Moreover, the sentencing court's experience was that Chapter 552 motions were often merely designed to delay the trial (A. 202). The letter-report

from Dr. Shuman to Mr. Watson was dated February 22, 1969 but Mr. Watson did not file his motion until some three months later, on May 27, 1969. At that time, he subsequently admitted, it was pointed out to him and he agreed that the motion was ineffective to invoke the procedures of Section 552.030, RSMo 1969, if it was his intent, whic hit apparently was, to raise a plea of not guilty by reason of "mental disease or defect" excluding responsibility. Yet, at the time the case was assigned out for trial, on June 23, 1969, he had failed to remedy the defect. It is fair to assume, as the sentencing court did (A. 202), that it was clear to Mr. Watson, based upon Dr. Shuman's report and his own observations, that the petitioner did not have a viable defense under Chapter 552 and for that reason Mr. Watson made no effort to cause the petitioner to undergo a psychiatric examination pursuant to Section 552.030. After learning that the petitioner had shot himself, Mr. Watson did not raise the issue of his client's mental competency, and that issue was not raised as a basis for overturning the petitioner's conviction on the direct appeal to the Supreme Court of Missouri. In sum, the actions Mr. Watson took with regard to raising his client's mental competency reveal that he was not sincere in raising the issue but only wished to delay the trial and did not seriously contend that the petitioner was in any way incapable of standing trial. In determining an accused's competency, the trial courts of Missouri, and undoubtedly those of the other states as well as the federal system, must rely on the sincere opinions of trial counsel. *Miller* v. *State, supra.* In light of all that occurred, however, Mr. Watson's exhortation that the petitioner was "not a person of sound mind and should have a further psychiatric examination" while it might otherwise be of some significance is totally empty and devoid of meaning on the *Pate* question presented this Court.

Mrs. Drope's testimony completely fails to support the contention that the trial court should have conducted a *Pate* competency hearing or acted pursuant to Section 552.020 (2). She wanted to make the best of the situation and to do what was best for her children. The thrust of her testimony makes it clear that it was Mr. Watson who suggested to her the possibility that her husband was in need of psychiatric help (A. 46). For that reason, she agreed to see Dr. Shuman but after talking with the doctor she was not convinced the petitioner was sick (A. 50). At most three or four times during the eight to ten years she had known the petitioner at the time of trial, he had rolled down a short flight of stairs (A. 59-60). He would do so, she explained, when he did not "get his way or [was] worried about something" (A. 47). As stated by the Missouri Court of Appeals, St. Louis District, those "episodes demonstrate pique more than anything" (A. 221; *Drope* v. *State*, *supra*, 498 S.W.2d at 842). When considered *in toto* there is nothing in her testimony that amounts to evidence of any sort that the petitioner was unable to assist defense counsel or understand the proceedings against him.

The petitioner's act of shooting himself is said to be evidence of his mental incompetency which should have caused the trial court to take the appropriate actions under Section 552.020 (2) consistent with the *Pate* doctrine. The petitioner continues to characterize his act of self-mutilation as an attempted suicide. There is substantial, although mostly circumstantial, evidence which indicates that the petitioner did not actually intend to take his own life and staged the act so as to be confident that he would not in fact die from the self-inflicted wound. Apparently he shot himself with a small caliber (.22) weapon in a non-vital part of the body at a time when help was

readily available. At hospital, while being interviewed by a police officer, the petitioner stated that his intention in shooting himself was to avoid going to trial. Under these circumstances, it is hardly fair to say that the petitioner tried to kill himself. At any rate, it is clear from the evidence adduced at the hearing on the motion for new trial that on the morning of June 25, 1969, the trial court knew that the petitioner had shot himself and was in hospital and had received information that he had made a statement to the effect that he had shot himself to avoid going to trial (A. 63, 97-100, 102-103). There was nothing before the trial court to suggest that the mental state of the petitioner which permitted him to discharge a firearm in his stomach to avoid attending trial would also prevent him from assisting his counsel and understanding the trial proceedings. The petitioner's testimony on the motion for new trial to the effect that he did not remember anything about the shooting (A. 73) is refuted by the testimony of the police officer (A. 97) and by the hospital records (A. 90) and was found by the trial court to be unbelievable (A. 103). Clearly, under the facts and circumstances, the petitioner did not want to go to court on June 25, 1969. If he had manifested that desire by stepping in front of a ten-ton truck, there might have been a basis for doubting his competency. But he chose to fulfill his desire by a means that was clearly calculated to achieve the result sought without, insofar as can be determined from the record before this Court, exposing himself to serious or permanent injury. Under these circumstances and the others in the case, it can hardly be said that the petitioner's act of shooting himself was evidence of mental incompetency calling for the trial court to act under Section 552.020 (2).

In the context of the *Pate* problem in this case, the opinions of Dr. Shuman and Dr. Lum in the record before

the Court are meaningless. Those opinions were not before the trial court for consideration at the time of trial so as to raise any question as to whether there was "reasonable cause" to believe the petitioner was suffering from a "mental disease or defect" excluding fitness to proceed. Moreover, those opinions were advanced by the two doctors as experts in the field of psychiatry, a degree of expertise to which no trial judge should be held, and were obviously formulated in response to the values of that field with no regard to what is legally practical or to a smoothly functioning legal procedure.

With the above analysis, the respondent believes that it has covered the ten "developments" listed by the petitioner on pages 25-26 of his brief. However, the responsive petition as to each "development" is summarized below.

(1) That the petitioner was charged with raping his wife and the facts of the offense lose all importance under the circumstances of this case and in light of Missouri law. On January 17, 1969, the evidence was that the petitioner smelled of liquor (A. 62) which to some extent could account for his aberrant behavior. In fact, according to Dr. Shuman's report, the petitioner had been drinking in excess of eight hours, and his friends for some time, before the rape was committed (A. 8). His culture included "abnormal sexual acts" (A. 12) and his wife admitted that he had performed certain types of those acts on her during their relationship (A. 11). Abnormal sexual conduct alone is not encompassed by the term "mental disease or defect." Section 552.010.

(2) That Mr. Watson caused the petitioner to be interviewed by Dr. Shuman evinces nothing other than that Mr. Watson was taking the necessary steps to explore the defenses open to the petitioner. The doctor's report, as argued, provides no basis for a Chapter 552 defense.

(3) It seems clear from her testimony that Mr. Watson suggested to Mrs. Drope that her husband was in need of psychiatric aid so that she would accompany him to see Dr. Shuman (A. 46). She actually signed the statement that she did not want to prosecute her husband not because she thought he was mentally ill and in need of psychiatric treatment but because she wanted him to take care of her children (A. 41). After talking with the doctor, she was not convinced that her husband was mentally sick (A. 50).

(4) Dr. Shuman's report, the next development listed by the petitioner on page 25 of his brief, has already been discussed in considerable detail. Suffice it to say that the respondent's position is that the report does not suggest that the petitioner was mentally incompetent to stand trial under Missouri law but in fact suggests the opposite. As stated in *Miller* v. *State, supra,* 498 S.W.2d at 85:

> "The suspicion or actual presence of some degree of mental illness or need for psychiatric treatment does not equate with incompetency to stand trial [Butler v. United States, 384 F.2d 522, 523 [1-3] (8th Cir. 1967)] and does not require the *sua sponte* hearing under Pate v. Robinson, *supra,* if the accused is not hindered in understanding the proceedings or in assisting counsel. United States v. Kaufman, 393 F.2d 172, 176 (7th Cir. 1968)...."

(5) Mr. Watson did not file his motion for over three months after the date Dr. Shuman made his report and the evidence, which has been discussed in detail, is fairly conclusive that the actual purpose of the motion was to cause a delay in the trial. The motion clearly did not call for a determination of the petitioner's competency to stand trial.

(6) It is the practice of the St. Louis Circuit Attorney to not oppose any motion which seeks a psychiatric examination regardless of the motion's merit or lack thereof (A. 206).

(7) The actions of Mr. Watson in raising, or failing to raise, the mental competency of his client also have been covered completely. The petitioner's characterization of Mr. Watson's advocacy on that issue as "fervent" and "vigorous" is not justified by the record, but quite the contrary as previously noted.

(8) Mrs. Drope said that at most her husband had rolled down stairs, indicating it would be a short flight of stairs, three or four times because he was worried or failed to get what he wanted (A. 47, 59-60). She had related that information to Dr. Shuman and the report indicates she told him that her husband rolled down stairs to gain her sympathy (A. 120). Regardless of why the petitioner behaved as he did, Dr. Shuman considered that information in making his report and that report was before the trial court.

(9) It is an exaggeration to say that Mr. Watson continually raised the question of the petitioner's mental competency in cross-examining Mrs. Drope. He did not do so any more than has already been indicated in this brief and, to some extent it would seem, to develop his theory that the petitioner was physically incapable of committing the crime charged (A. 51). If it was her opinion on the question he sought, she apparently gave it by remaining unconvinced that her husband was mentally sick (A. 50) even after Dr. Shuman had told her the petitioner had some problems (A. 46).

(10) There is no evidence in the record before this Court whatsoever that the petitioner attempted to kill

himself when he shot himself in the stomach on the morning of June 25, 1969. Apparently the shooting occurred around 8:15 a.m. (A. 85). The petitioner was admitted to the hospital at 8:35 a.m. (A. 146) and was conscious at that time and made a statement to the admitting doctor that he had shot himself because of some problem with the law (A. 90-91). The petitioner was interviewed at the hospital by the police officer at some time before 9:00 or 9:15 a.m. (A. 98). Before the interview, the officer had learned that the petitioner was not in critical condition (A. 97-98). At the time of the interview, the petitioner was conscious and his speech was clear and coherent (A. 96). The petitioner made a statement to the police officer to the effect that he had shot himself to keep from going to trial (A. 97). Under all the facts and circumstances, the petitioner did not choose to commit or attempt suicide but chose to shoot himself with a small caliber weapon in a non-vital spot when immediate medical attention was assured for the express purpose of avoiding attending trial. The act committed by the petitioner is not evidence under the relevant facts and circumstances that he was mentally incompetent to stand trial.

The petitioner also advances the theory that an act of attempted suicide in itself should be sufficient to invoke the procedural protections of the *Pate* doctrine and Section 552.020 (2). Even if that theory were to find this Court's approval in the abstract, there is no basis for applying it in this case as there is nothing in the record before this Court to indicate that the petitioner attempted to destroy himself but, rather, the record is replete with evidence that he had no intention to achieve that result and acted so as to avoid that result. The theory is fatuous however unless it is modified by the requirement that there be some evidence in the record to raise a *bona fide*

doubt to the effect that the act of attempted suicide was brought about by a mental condition and that same condition could hinder assisting counsel or understanding the proceedings. *See United States* v. *Marshall*, 458 F.2d 446 (2d Cir. 1972); *Daugherty* v. *Beto*, 388 F.2d 810 (5th Cir. 1967). There is nothing in the record before this Court to suggest that the petitioner's act of shooting himself was the result of a mental condition which adversely affected his capability of assisting his counsel or understanding the trial.

The reasons which cause people to attempt suicide are varied and only a small percentage of those reasons amount to mental incompetency in the legal sense (A. 159). The petitioner's suggested rule which makes "attempted suicide" synonymous with *Pate's* "*bona fide* doubt" or Missouri's "reasonable cause" is obviously unworkable and would serve only to switch the legal focus from a consideration of a mental condition which may have precipitated the act to a determination of whether the act was really committed for the purpose of self-destruction.

Finally, the way in which this case is distinguished from the *Pate* case is evident and was adequately summarized by the Missouri Court of Appeals, St. Louis District (A. 219, 222; *Drope* v. *State, supra*, 498 S.W.2d 841, 843). The respondent does not believe it is necessary to draw any further distinctions.

The finding of the sentencing court, affirmed as not clearly erroneous by the Missouri Court of Appeals, St. Louis District, that the facts, circumstances and evidence in this case did not require the trial court to hold a *Pate* competency hearing or the Missouri equivalent is not clearly erroneous and this Court should therefore affirm that finding.

II.

The Constitutionality of Continuing the Petitioner's Trial in His Absence, Except As to Whether His Absence Was Caused by Mental Incompetency, Is Not Properly Before This Court and the Finding That the Petitioner Had Not Satisfied His Burden of Proof with Regard to the Exception Is Not Clearly Erroneous.

On the direct appeal of his conviction to the Supreme Court of Missouri, the petitioner litigated the question of whether he was denied due process or his Sixth Amendment rights when his trial was continued without him after he shot himself to avoid standing trial and the highest court of this state determined that there was no constitutional deprivation, under the circumstances, in receiving evidence, instructing the jury, hearing the arguments of counsel and accepting the jury's verdict in the petitioner's absence (A. 110-116; *State* v. *Drope, supra,* 462 S.W.2d at 680-684). This Court's writ does not extend to the Supreme Court of Missouri nor to that determination. This Court is without a jurisdictional basis for considering the merits of that determination. *Cf.* 28 U.S.C. § 1257 (3) (1970).

The only aspect of the question of whether the petitioner was denied his constitutional rights when the trial continued without his presence open to the Court to which the writ of *certiorari* is taken, the Missouri Court of Appeals, St. Louis District, and apparently litigated by the petitioner was whether his absence was involuntary in that it was due to mental incompetency (A. 223; *Drope* v. *State, supra,* 498 S.W.2d at 843). The petitioner, it is evident, from the record, actually made no attempt to litigate the question of his mental competency and the only evidence introduced at the hearing on his Rule 27.26 motion which is in any way relevant to that question was the testimony

of Dr. Shuman and Dr. Lum. The petitioner seemingly does not contend that their testimony was sufficient to establish that he was mentally incompetent at the time he shot himself or at any other time but, if so, he clearly did not meet his burden of proof under Rule 27.26. Consequently, the Missouri Court of Appeals, St. Louis District, was correct in holding that the finding that the petitioner had not established a basis for relief on the contention that his absence was involuntary in that it resulted from mental incompetency is not clearly erroneous (A. 223; *id.*).

As previously argued under Point I of this brief, this Court should accept the limitations of a Rule 27.26 proceeding in considering this writ. The argument made in that regard previously is reasserted here *in toto*. The entire thrust of Point II of the petitioner's brief is to relitigate the question decided by the Supreme Court of Missouri on direct appeal. That question was *res judicata* to the Missouri Court of Appeals, St. Louis District, and so should it be to this Court on this writ. Rule 27.26 is not designed to provide a second appeal.

Obviously, the constitutionality of continuing the trial in the petitioner's absence is not *res judicata* to a federal district court having *habeas* jurisdiction. *Townsend* v. *Sain*, 372 U.S. 293 (1963). In his brief, the petitioner vehemently argues that the state court determination that he voluntarily absented himself from trial is meaningless. If that is true, which the respondent does not believe, this court is provided no basis for taking remedial action as it is not known what action is warranted. Under the holding in *Townsend* v. *Sain*, *id.* at 313, and pursuant to 28 U.S.C. § 2254 (1970), a federal district court in *habeas* could determine what remedy, if any, is warranted. Clearly, this Court should require the petitioner to pursue any state remedies he has thus far failed to exhaust with regard to

the second question presented and proceed from there to invoke his federal *habeas* remedy.

Parenthetically, the respondent will state that it does not believe the petitioner has exhausted his state remedies on the question of whether his absence from trial was caused by mental competency. As previously indicated, the petitioner made no meaningful attempt to litigate that issue in his Rule 27.26 motion and, of course, his mental competency was not put to issue at trial.

In determining that there was no constitutional infringement in proceeding with the trial in the petitioner's absence, the Supreme Court of Missouri gave full consideration to the fact that the petitioner was charged with a capital offense (A. 116; *State* v. *Drope, supra,* 462 S.W.2d at 683-684). Therefore, as analyzed above, that issue is also foreclosed to this Court on this writ. However, the state court correctly determined that the petitioner was charged with a capital offense is of no moment or constitutional significance. In this case, although the petitioner was charged with an offense which was, at that time, punishable by death, he was free on bond. The dicta in *Diaz* v. *United States,* 223 U.S. 442, 445 (1912) to the effect that one charged with a capital crime may not waive his right to be present at trial, upon which the petitioner so heavily relies, clearly is based on the assumption that one accused of a capital offense is in custody and not free on bond. *See id.* at 456-460 and cases cited therein. Although the cases which follow the dicta in *Diaz* perpetuate the "rule" that one accused of a capital offense may not waive his right to be present at trial, without considering whether the accused is in custody or free on bond, that rule is illusory and never implemented in practice. The rule which is implemented is that one accused of a capital offense who remains in custody so that his presence at trial is subject

to the whim of his custodian may not waive his right to be present at every stage of his trial. *See Near* v. *Cunningham,* 313 F.2d 929 (4th Cir. 1963). Clearly, the rule which is in fact implemented is inapplicable under the facts of this case as the petitioner was free on bond. Under these circumstances, *Diaz* provides no basis for finding a violation of the petitioner's constitutional rights in the state proceedings.

Furthermore, under the facts and circumstances of this case as previously outlined, the trial court was completely justified in holding that the petitioner had voluntarily and wilfully absented himself from trial, thus waiving his right to be present. The evidence before the trial court was that on the morning of June 25, 1969, the petitioner shot himself in the stomach and caused himself to be hospitalized so that he would not have to attend his trial. Under these circumstances, the trial court was clearly warranted in continuing the trial in the petitioner's absence and finding that the petitioner had waived his right to be present. *See Illinois* v. *Allen,* 397 U.S. 337 (1970). Further, as previously argued in detail under Point I and reasserted here, there was nothing before the trial court to suggest that the petitioner was incapable of assisting his counsel or understanding the proceedings. Moreover, the petitioner was presumed to be sane at the time of his trial. Section 552.030 (7); *Leland* v. *Oregon,* 343 U.S. 790 (1952). There was nothing before the trial court to suggest otherwise or to suggest that the petitioner's act of shooting himself was the result of mental incompetency. Under these circumstances, the trial court provided the petitioner with a full and fair hearing on the question of the waiver of his right to be present at trial (A. 67-103) and there was no constitutional error.

CONCLUSION

For the reasons stated in the argument portion of this brief, the writ of *certiorari* was providently granted and the writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

APPENDIX B

Fourteenth Amendment to the Constitution of the United States, Section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

Missouri Supreme Court Rule 27.26, V.A.M.R.:

27.26 Sentence Unlawful—Motion to Vacate or Correct—Form and Scope of Motion—Notice to Prosecuting Attorney—Appointment of Counsel—Hearing—Order—Effect of Order—Appeal. A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) Nature of Remedy. This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) When Remedy May be Invoked.

(1) The provisions of this Rule may be invoked only by one in custody claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) Form and Sufficiency of Motion. A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside or correcting his conviction and sentence. The prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) Successive Motions. The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of this Rule. The burden shall be be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) Hearing. As soon as a motion hereunder is received by the circuit clerk, he shall notify the prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. "Prompt" means as soon as reasonably possible considering other urgent business of the court. This hearing shall be an evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) Burden of Proof. The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) Presence of Prisoner. The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) Right to Counsel. If a motion presents questions of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motion filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner whether he has included all grounds known to the prisoner as a basis for attacking the judgment and sentence and to amend the motion to include any claims not already included. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

(i) Judgment. The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(j) Appeal. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the State. An appeal may be taken from the order entered on the motion as in a civil case as authorized by §512.020, RSMo 1959, V.A.M.S. Appellate review shall be limited to a determination of whether the findings, conclusions and judgment of the trial court are clearly erroneous.

(k) Costs. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal *in forma pauperis* and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) Counsel on Appeal. If a prisoner desires to appeal and contends he is without means to employ counsel to perfect the appeal, the trial court, if satisfied that the

prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

APPENDIX D

Section 552.010, RSMo 1969:

Mental disease or defect defined.—The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, RSMo, nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770, RSMo.

APPENDIX E

Section 552.020, RSMo 1969:

552.020. Lack of mental capacity bar to trial or conviction—psychiatric examination, when, report of—commitment to hospital, when—statements of accused inadmissible, when.—1. No person who as a result of mental disease or defect lacks capacity to understand the proceed-

ings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.

2. Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private physicians to make a psychiatric examination of the accused or shall direct the superintendent of a facility of the division of mental diseases to have the accused so examined by one or more physicians whom the superintendent shall designate. The order shall specify the time, place, and conditions under which the examination shall be conducted, and shall direct that written reports of the examination be filed with the clerk of the court. The order may include provisions for the interview of witnesses or other physicians and for a commitment of the accused to a hospital or other suitable facility for such time and under such conditions as the court deems necessary for the purpose. If the order specifies commitment to a facility of the division of mental diseases, the examining physician shall not be named in the order.

3. A report of the psychiatric examination shall include:

(1) Detailed findings;

(2) An opinion as to whether the accused has a mental disease or defect, and the duration thereof;

(3) An opinion as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense;

(4) An opinion as to whether at the time of the alleged criminal conduct the accused as a result of mental disease or defect did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law;

(5) A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending determination by the court of the issue of mental fitness to proceed; and

(6) A recommendation as to whether the accused, if found by the court mentally fit to proceed, should be detained in such hospital facility pending further proceedings.

4. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within five days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing and at their own expense. If such examination is ordered, a report of the examination made by the examining physician shall be furnished to the court and to the opposing party.

5. If the psychiatric report contains the recommendation that the accused should be held in custody in a suitable hospital facility pending determination of the issue of mental fitness to proceed, and if the accused is not admitted to bail, or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending determination of the issue of mental fitness to proceed.

6. If neither the state nor the accused nor his counsel contests the opinion referred to in subsection 3, subdivision (3), of this section relative to fitness to proceed, the court may make a determination and finding of record on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and to cross-examine the physicians who rendered such opinion and to offer evidence upon the issue.

7. If the court determines that the accused has mental fitness to proceed and does not admit the accused to bail, or release him on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending further proceedings. If the court determines that the accused lacks mental fitness to proceed, the proceedings against him shall be suspended and the court shall commit him to the custody of the director of the division of mental diseases for so long as the unfitness endures or until the charges or proceedings are disposed of according to law. The committed person shall be entitled to the writ of habeas corpus upon proper petition to the court which committed him. The issue of his mental fitness to proceed after such commitment may also be raised by a motion filed by the director of the division of mental diseases or by the state, alleging the mental fitness of the accused to proceed. A psychiatric report relating to the issue of the accused's mental fitness to proceed may be attached thereto. If the motion is not contested by the accused or his counsel or if after a hearing on a motion the court finds the accused mentally fit to proceed, or if he is ordered discharged from the director's custody upon

a habeas corpus hearing, the criminal proceedings shall be resumed. If, however, the prosecuting or circuit attorney determines that so much time has elapsed since the commitment of the accused that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

8. If the charges against any accused person are dismissed either by the state or by the court and if he is then in custody of the director of the division of mental diseases, he shall not be retained in such custody or in any hospital unles proper proceedings have been instituted and held as provided in sections 202.780 to 202.875, RSMo, in which case these sections and no other shall be applicable to his continued retention, hospitalization and discharge.

9. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any physician or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

(L. 1963 p. 674 §2, A. L. 1969 H. B. 29)

APPENDIX F

Section 552.030, RSMo 1969:

Mental disease or defect, not guilty plea based on—evidence—notice of defense—examination, reports confidential—statements not admissible, exception—presumption of competency—verdict contents.—1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

2. Evidence of mental disease or defect excluding responsibility shall not be admissible at trial of the defendant unless the defendant at the time of entering his plea to the charge pleads no guilty by reason of mental disease or defect excluding responsibility, or unless within ten days after a plea of not guilty or at such later date as the court may for good cause permit, he files a written notice of his purpose to rely on such defense. Such a plea or notice shall not deprive the defendant of other defenses. The state may accept a defense of mental disease or defect excluding responsibility, whether raised by plea or written notice, if the defendant has no other defense and files a written notice to that effect. Upon the state's acceptance of the defense of mental disease or defect excluding responsibility, the court shall proceed to order the commitment of the defendant as provided in section 552.040 in cases of persons acquitted on the ground of mental disease or defect excluding responsibility, and further proceedings shall be had regarding the confinement and release of the defendant as provided in that section.

3. Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible

(1) To prove that the defendant did or did not have a state of mind which is an element of the offense; or

(2) For the purpose of determining whether or not the defendant, if found guilty of a capital offense, shall be sentenced to death or life imprisonment.

4. Whenever the defendant has pleaded mental disease or defect excluding responsibility or has given the written notice provided in subsection 2, and such defense has not been accepted as therein provided, the judge or magistrate shall, after notice and upon motion of either the state or the defendant, by order of record, appoint one or more private physicians to make a psychiatric examination of the defendant, or shall direct the superintendent of a facility of the division of mental diseases to have the defendant so examined by one or more physicians whom the superintendent shall designate. The order shall direct that written report or reports of such examination be filed with the clerk of the court. No private physician shall be appointed unless he has consented to act. Examinations ordered hereunder shall be made at such time and place and under such conditions, including confinement to a hospital or other suitable facility and the interview of witnesses or other physicians, as the court deems proper. If the order specifies a commitment to a facility of the division of mental diseases, the examining physician or physicians shall not be named in the order. If an examination provided in section 552.020 was made and the report thereof included an opinion whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality or wrongfulness of his conduct or as a result of mental disease or

defect was incapable of conforming his conduct to the requirements of law, such report may be received in evidence, and no new examination shall be required by the court unless, in the discretion of the court, another examination is necessary. Within five days after receiving a copy of such report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of his or its own choosing and at his or its expense. The clerk of the court shall deliver copies of the report or reports to the prosecuting or circuit attorney and to the accused or his counsel. All psychiatric reports required by this subsection shall conform to the requirements under subsection 3 of section 552.020 and shall not be public records or open to the public.

5. If the psychiatric report contains the recommendation that the accused should be held in custody in a suitable hospital facility pending trial, and if the accused is not admitted to bail, or released on other conditions, the court may order that the accused be committed to or held in a suitable hospital facility pending trial.

6. No statement made by the accused in the course of any such examination and no information received by any physician or other person in the course thereof, whether such examination was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of whether he committed the act charged against him in any criminal proceeding then or thereafter pending in any court, state or federal. The statement or information shall be admissible in evidence for or against him only on the issue of his mental condition, whether or not it would otherwise be deemed to be a privileged communication. If the statement or information is admitted

for or against the accused on the issue of his mental condition, the court shall both orally at the time of its admission and later by instruction inform the jury that it must not consider such statement or information as any evidence of whether the accused committed the act charged against him.

7. All persons are presumed to be free of mental disease or defect excluding responsibility for their conduct, whether or not previously adjudicated in this or any other state to be or to have been insane, drunkards, drug addicts, sexual or social psychopaths, or otherwise mentally ill, incompetent, deranged or impaired. The issue of whether any person had a mental disease or defect excluding responsibility for his conduct is one for the jury to decide upon the introduction of substantial evidence of lack of such responsibility. But in the absence of such evidence the presumption shall be conclusive. Upon the introduction of substantial evidence of lack of such responsibility, the presumption shall not disappear and shall alone be sufficient to take that issue to the jury. The jury shall be instructed as to the existence and nature of such presumption when requested by the state and, where the issue of such responsibility is one for the jury to decide, the jury shall be told that the burden rests upon the accused to show by a preponderance or greater weight of the credible evidence that the defendant was suffering from a mental disease or defect excluding responsibility at the time of the conduct charged against him. At the request of the defense the jury shall be instructed by the court as to the contents of subsection 1 of section 552.040.

8. When the defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and the judgment shall so state.

APPENDIX G

Section 559.260, RSMo 1969:

Rape, punishment.—Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of sixteen years, or by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.

APPENDIX H

Section 202.700, RSMo 1969:

Criminal sexual psychopath defined.—All persons suffering from a mental disorder and not insane or feebleminded, which mental disorder has existed for a period of not less than one year immediately prior to the filing of the petition provided for in section 202.710 coupled with criminal propensities to the commission of sex offenses, and who may be considered dangerous to others, are hereby declared to be "criminal sexual psychopaths".

APPENDIX I

28 U.S.C. § 1257(3) (1970):

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest coutr of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

APPENDIX J

28 U.S.C. § 2254 (1970):

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent therof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent

part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

PETITIONER'S REPLY BRIEF

INTRODUCTION

Although respondent's factual presentation contains a number of inaccuracies resulting partly from omissions of significant and relevant facts and partly from misinterpretation of the evidence, we do not consider it appropriate or necessary to engage in a lengthy and detailed refutation of respondent's version of the facts. Petitioner submits that the Statement of the Case in his opening brief accurately and comprehensively details the facts relevant to the issues before this Court.

ARGUMENT

I.

RESPONDENT'S PIECEMEAL CONSIDERATION OF THE FACTS DOES NOT CONFRONT THE CONSTITUTIONAL QUESTION OF WHETHER IN THE CONTEXT OF THE TOTAL PICTURE PRESENTED TO THE COURT THERE WAS A BONA FIDE DOUBT RAISED AS TO PETITIONER'S MENTAL COMPETENCY TO STAND TRIAL.

Respondent ignores petitioner's argument that the Missouri courts below failed to consider and weigh all of the evidence together as a whole but, rather, impermissibly isolated each separate fact and determined whether that fact standing alone raised a reasonable doubt about petitioner's competency. That approach was specifically rejected by the rationale of this Court's opinion in *Pate v. Robinson*, 383 U.S. 375 (1966) and also by the Ninth Circuit in *Moore v. United States*, 464 F.2d 663, 666 (1972). The critical issue is whether or not the composite picture before the trial court raised—or should have raised—any reasonable doubt as to petitioner's mental competency to proceed with his trial.

Faced with uncontroverted facts, which undeniably on their face raise serious questions concerning petitioner's fitness, respondent vainly attempts to dilute their significance by fragmenting each incident of irrational behavior and ignoring the totality of circumstances portrayed by the record. Respondent's splintered whitewash of the facts can be distilled into three major assertions:

(1) That petitioner's trial counsel did not "seriously and sincerely" believe that his client lacked the mental capacity to stand trial (Resp.Br. 24);

(2) That petitioner's shooting of himself was not an attempt at suicide (Resp.Br. 30-31); and

(3) That the testimony of Drs. Shuman and Lum at the Rule 27.26 hearing was meaningless (Resp.Br. 27-28).

We will discuss respondent's misconceptions of the evidence *seriatim*.

(1) Respondent's baseless attack on the sincerity of petitioner's trial counsel betrays its obvious frustration in attempting to justify its untenable position that there was no bona fide doubt of petitioner's competency. Faced with a record of repeated requests for a psychiatric examination and a hearing, respondent lamely responds that trial counsel was not sincere in his efforts and did not seriously believe that petitioner might be mentally incompetent. The State suggests that those requests were nothing but a ruse to obtain a delay of the trial. These contentions are not only belied by the record but are directly contrary to the State's own position in consenting to a psychiatric examination (A.14). The problem was not counsel's lack of sincerity or advocacy, but the trial court's impatient unwillingness to listen to him.

Although respondent gingerly argues that the written motion filed by trial counsel for a psychiatric examination was "not in proper form" (Resp. Br. 25), it cites no authority prescribing any particular form. Indeed, there is none. Respondent's exaltation of form over substance is unpersuasive because everyone, including the court, understood that petitioner's attorney was requesting a psychiatric examination. Respondent fails to come to grips with the overwhelming record of repeated pleas but summarily brands them as "totally empty and devoid of meaning"

(Resp. Br. 25), and suggests that counsel was raising an insanity defense on the merits rather than objecting about proceeding with the trial. Apparently, respondent yet fails to comprehend the teachings of *Pate*, for there a similar argument that trial counsel failed appropriately to raise the issue of defendant's competence was made by the State of Illinois and was flatly rejected by this Court, l.c. 385, n. 6:

* * *

> "Even if counsel may also have meant to refer to the statutory provisions dealing with commitment for present insanity . . . , this fact would not affect the determination that counsel's *words* raised a question as to competence that the trial judge should have considered."[1]

(2) Respondent confronts the admitted facts that petitioner (a) shot himself in the stomach during his trial, (b) was rushed unconscious to St. Louis City Hospital, (c) underwent emergency surgery there that same morning, (d) was transferred the following day to Homer G. Phillips Hospital where he underwent a second operation, and (e) was hospitalized twenty-one days in all, by theorizing that the petitioner did not actually intend to take his own life but staged the act, confident that he would not in fact die from the self-inflicted wound (Resp. Br. 30-32).[2] The very record which respondent built at the trial below refutes its present contentions. Patrolman Dampier, whom it called as its witness at the hearing on the Motion for a New

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[1] Emphasis ours here and throughout this brief except where otherwise indicated.

[2] Apparently, respondent is now retreating from its strategy asserted in its Brief in Opposition to the Petition for Certiorari where it assumed that petitioner had attempted to kill himself (Br. in Opp., p.5).

Trial, testified that he responded to a call for *"attempted suicide"* (A.94). He further testified that petitioner told him "he would rather be *dead* than go to trial for something he didn't do," so he got his rifle and shot himself (A.97).

Moreover, respondent's view does little to eliminate the doubt of petitioner's competency. Certainly, one who blasts a hole in his own bowels as a means of avoiding trial, even if he did not intend to kill himself, can scarcely be deemed normal. Petitioner was free on bond and could have merely absconded. In retrospect, the alternative mode of escapism employed by petitioner merely served to confirm his mental instability and need for help. In any event, the Missouri Court of Appeals, in deciding the case, assumed that "Drope's action in shooting himself was in fact a bona fide attempt at suicide" (A.222), and since the State did not take issue with that assumption in its Brief in Opposition, it is not in a position to retry the facts or to recast the issues at this juncture.

(3) Respondent attempts to sweep under the rug the compelling testimony of Drs. Lum and Shuman at the Rule 27.26 hearing, by claiming that their testimony was meaningless because it was not presented to the trial court prior to conviction and because they possessed a higher degree of expertise than the trial judge. Respondent's argument is as ironic as it is illogical, for if the trial court had properly accorded petitioner his rights in the first instance, the physicians' testimony would, indeed, have been presented to the court prior to trial.[3] Moreover, the very reason for requiring a psychiatric examination is the presumption

[3] In *Schmidt v. State*, 307 N.E.2d 484 (Ind.App. 1974), the court permitted the post-trial testimony of two psychiatrists to be used to establish the reasonable doubt about the defendant's sanity at the time of trial.

that the court needs the aid of qualified experts in order to make a meaningful determination as to the defendant's competency. In effect, respondent's position, in capsule form, is that a defendant is not entitled to a pre-trial evaluation of his competency and that a post-trial analysis is too late. Such a proposition must rank among the most remarkable ever presented to this Court.[4]

One final comment appears appropriate regarding respondent's efforts to erect a protective procedural shield around the findings of fact and conclusions of law of the Missouri courts. Respondent seeks to insulate the Missouri courts' rulings from this Court's scrutiny by invocation of the "clearly erroneous" standard prescribed by Missouri Rule 27.26. It is well-settled, however, that this Court's *certiorari* power is not circumscribed by the niceties of state procedural rules. In *Douglas v. Alabama*, 380 U.S. 415, 422 (1965), the Court held that "we follow our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." The language in *Napue v. Illinois*, 360 U.S. 264, 271-72 (1959), could hardly be more conclusive or dispositive:

> "[T]he State argues that we are not free to reach a factual conclusion different from that reached by the Illinois Supreme Court . . . The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Cooper v. Aaron*, 358 U.S.

[4] Respondent's further statement that Drs. Shuman and Lum's testimony was unmindful of "what is legally practical" is dispelled by the fact that Dr. Lum is employed by the State of Missouri specifically for the purpose of administering psychiatric examinations pursuant to Chapter 552 (Mo.Rev.Stat.), Missouri's Mental Responsibility statute (A. 150-51).

1. This principle was well stated in *Niemotko v. Maryland*, 340 U.S. 268, 271:

> "'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.'"
>
> "It is now so well settled that the Court was able to speak in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121, of the 'long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.'"[5]

Although this Court's function must not be impeded by state imposed scope-of-review restrictions, it makes no difference in the context of this case what type of critique is applied to the actions of the Missouri courts, for the judgment being reviewed here is not only "erroneous" but manifestly, prejudicially and unqualifiedly so.

II.

THE ISSUE OF WHETHER PETITIONER'S RIGHTS WERE VIOLATED WHEN HE WAS TRIED IN HIS ABSENCE IS PROPERLY AND SQUARELY BEFORE THIS COURT.

It would be easier for petitioner to reply to Point II of Respondent's Brief if the State's position expressed

[5] See also, *Whitus v. Georgia*, 385 U.S. 545, 550 (1967), where, as here, there was no controversy as to the constitutional principle involved, the question being its application to the facts disclosed in the record; *Cox v. Louisiana*, 379 U.S. 536, 545 at n.8 (1965); *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963).

therein were intelligible. The only conclusion that emerges forcefully is that respondent has despaired of any attempt to confront petitioner's second point on its merits. Whether the morass of befuddling procedural arguments was purposefully contrived to muddy the waters or whether the confusion was simply generated by imprecision of language, we do not know. Neither can we discern what the State's position is, except that somehow this Court is purportedly without power to decide petitioner's constitutional claims. At the risk of conjecture, however, we will endeavor to meet the apparent substance of respondent's position.

Respondent concedes (Resp. Br. 19) that "the second question now raised by the petitioner before this Court was also presented to the Missouri Court of Appeals." Later in its brief, however, the State seems to withdraw from that admission and to assert that the constitutionality of trying and convicting petitioner in his absence was decided adversely to petitioner on his direct appeal by the Supreme Court of Missouri and was thus *res judicata* to the Missouri Court of Appeals in the post-conviction proceeding. Significantly, respondent refers to no statutory or case authority in support of this proposition. To our knowledge, there is none. The issue raised by Petitioner's Point II is not a factual one but a legal one of constitutional dimensions. Our judicial system does not permit the concept of *res judicata* to perpetuate the unconstitutional incarceration of an accused. Respondent's unsupported suggestion is directly antithetical to the very purpose and intent of the deep rooted right of habeas relief and was soundly spurned by this Court in *Sanders v. United States*, 373 U.S. 1, 8 (1963):

> "If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia, supra*, at 402, access to the courts on

habeas must not be impeded. *The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.*"

Since Missouri Rule 27.26 is merely a codification of the common law writ of habeas corpus (See Rule 27.26(a)),[6] its scope is no more limited than that of the federal writ. Moreover, neither the Rule, nor Missouri case law prohibits a prisoner from raising constitutional errors in a Rule 27.26 motion, even though they may have been raised in a prior proceeding. Rule 27.26(b)(3); *State v. Moreland*, 351 S.W.2d 33, 37 (Mo. 1961).

Additionally, the following observations are apt. First, while the Missouri Supreme Court on direct appeal did consider the question of petitioner's absence, it did not assess such absence in light of his mental condition. Second, the issue of petitioner's absence was fully litigated by the courts below in this Rule 27.26 proceeding, and at no time did respondent assert that it was barred by *res judicata*. The Missouri Court of Appeals did not consider the Missouri Supreme Court's decision *res judicata*, but made its own ruling on the point, which respondent contends is not "clearly erroneous" (Resp.Br. 34). Third, as pointed out above, this Court has always undertaken an independent examination of the whole record and is not "bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963).

Respondent's "exhaustion" argument is equally baffling. Respondent seems to contend that since, in its view, the "real" issue of whether or not petitioner was *in fact* mentally incompetent has not been litigated, the issue of petitioner's absence from trial cannot be

[6]The entire text of Rule 27.26 is set forth at pages 1b through 5b of petitioner's principal brief.

reviewed on this writ of certiorari as petitioner has not exhausted his remedies.[7] Respondent again misses the point. Whether or not petitioner was *in fact* ultimately mentally incompetent is not an issue here and never has been in this proceeding.[8] Since under Missouri law, a psychiatric examination and hearing is a prerequisite to any finding of incompetency, the state courts, by denying petitioner his constitutional right to a psychiatric examination and hearing at the time of trial, have effectively precluded him from any opportunity of proving he was mentally unfit to proceed with trial or to waive his right to be present.[9] In short, the

[7]However, respondent's contentions are contradictory even on this point. In one sentence, on page 33 of its brief, respondent states that the question of "whether [petitioner's] absence was involuntary in that it was due to mental incompetency" was "apparently litigated by the petitioner." But in the very next sentence, respondent, states that "petitioner, it is evident from the record, actually made no attempt to litigate the question of his mental competency."

[8]Throughout the proceedings on petitioner's Rule 27.26 motion in the state courts below and even at this level, respondent has either failed to recognize or attempted to obfuscate the real issue. The State has repeatedly suggested that the real issue is whether there was proof that petitioner, *in fact, was* mentally incompetent. In the state courts and again, in its Brief in Opposition in this Court (p. 12), respondent stated: "Furthermore, the respondent cannot help but believe that the principal issue by the petitioner here is a false one. The *real issue* is whether petitioner *in fact* was suffering from a mental disease or defect excluding fitness to proceed."

[9]The Court in *Pate*, supra at 387, clearly recognized the impracticability of attempting to retrospectively determine a defendant's mental competency as of the time of his trial:

constitutionality of trying and convicting petitioner in his absence was placed point-blank before the Missouri Court of Appeals, to which this Court's writ is directed, and was decided adversely to petitioner. There is no exhaustion problem as to this issue.

Respondent further argues that if this Court rejects the state court's determination as to the voluntariness of petitioner's absence from trial, then "this Court is provided no basis for taking remedial action as it is not known what action is warranted" (Resp. Br. p. 34). Such an astonishing underestimation of this Court's powers could only have resulted from a failure either to read or to comprehend *Pate v. Robinson*, where it was stated at 386:

> "Having determined that Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial, *we direct that the writ of habeas corpus must issue* and Robinson be discharged, unless the State gives him a new trial within a reasonable time."

See also, *Moore v. United States*, 464 F.2d 663, 666-67 (9th Cir. 1972); *Clonch v. Boles*, 419 F.2d 393, 394 (4th Cir. 1969); *Hansford v. United States*, 365 F.2d 920, 925-26 (D.C. Cir. 1966); *Rand v. Swenson*, 365 F.Supp. 1294, 1299 (E.D. Mo. 1973), *affirmed* 501 F.2d 394 (8th Cir. 1974).

"It has been pressed upon us that it would be sufficient for the state court to hold a limited hearing as to Robinson's mental competence at the time he was tried in 1959. If he were found competent, the judgment against him would stand. But we have previously emphasized the difficulty of retrospectively determining an accused's competence to stand trial. *Dusky v. United States*, 362 U.S. 402 (1960). The jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties."

Respondent also erroneously attempts to restrict the applicability of *Diaz v. United States*, 223 U.S. 442 (1912), to only those persons accused of a capital crime who are *in custody*. The Court's holding, however, was not so confined. The Court clearly held in *Diaz* that two separate classes of defendants were incapable of waiving their right to be present: (1) those who are in custody because their presence or absence is not within their own control, *and* (2) those who are charged with a capital offense "because, in addition to being *usually* in custody, [they are] deemed to suffer the constraint naturally incident to an apprehension of the lawful penalty that would follow conviction." *Id.* at 445.

Finally, respondent's endorsement of the trial court's finding that petitioner had *voluntarily* absented himself from trial overlooks the fact that the holding was predicated on the erroneous view that petitioner's absence was *presumed* to have been voluntary (A.111). Such a presumption, however, is repugnant to the controlling rule stated by Judge Fahy in *Cureton v. United States*, 396 F.2d 671, 676 (D.C. Cir. 1968):

> "In the above circumstances, taking into consideration the right, the obligation, and that the orderly administration of justice takes account on the one hand of the importance of a defendant's presence and, on the other hand, the need for control of the situation by the court, we conclude that if a defendant at liberty remains away during his trial the court may proceed *provided it is clearly established that his absence is voluntary*. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away."

CONCLUSION

The record in this case manifestly discloses that petitioner has been denied his constitutional rights. For the reasons stated, the judgment should be reversed and petitioner's conviction vacated.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DROPE *v.* MISSOURI

CERTIORARI TO THE COURT OF APPEALS OF MISSOURI FOR THE ST. LOUIS DISTRICT

No. 73-6038. Argued November 13, 1974—
Decided February 19, 1975

In 1969 petitioner was indicted, with two others, for rape of petitioner's wife. Following severance of petitioner's case, he filed a motion for a continuance so that he might be further examined and receive psychiatric treatment, attaching thereto the report of a psychiatrist who had examined him at his counsel's request and had suggested such treatment. The motion was denied and the case proceeded to trial. Petitioner's wife testified, repeating and confirming information concerning petitioner's "strange behavior" which was contained in the report and stating that she had changed her mind about not wanting to prosecute petitioner because he had tried to kill her on the Sunday prior to trial. On the second day of the trial petitioner shot himself in a suicide attempt and was hospitalized, but despite his absence the trial court denied a motion for a mistrial on the ground that his absence was voluntary, and the trial continued. The jury returned a guilty verdict and petitioner was sentenced to life imprisonment. His motion for a new trial asserting that the trial court had erred in proceeding with the trial when no evidence was produced that his absence was voluntary, was denied, the trial court finding again that his absence was voluntary. The Missouri Supreme Court affirmed, sustaining that finding and also holding that the trial court's denial of the continuance motion was not an abuse of discretion. Subsequently, petitioner's motion to vacate the conviction and sentence, alleging, *inter alia*, that his constitutional rights had been violated by the failure to order a pretrial psychiatric examination and by completing the trial in his absence, was denied. The Missouri Court of Appeals affirmed, holding that neither the psychiatric report attached to petitioner's motion for

Syllabus

a continuance nor his wife's testimony raised a reasonable doubt of his fitness to proceed, that petitioner's suicide attempt did not create a reasonable doubt of his competence as a matter of law, and that he had failed to demonstrate the inadequacy of the procedures employed for protecting his rights. The court also held that the trial court's finding as to voluntary absence was not clearly erroneous. *Held:*

1. The Missouri courts failed to accord proper weight to the evidence suggesting petitioner's incompetence. When considered together with the information available prior to trial and the testimony of petitioner's wife at trial, the information concerning petitioner's suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry. Pp. 15–17.

2. Whatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his suicide attempt, and there being no opportunity without his presence to evaluate that bearing in fact, the correct course was to suspend the trial until such an evaluation could be made. Pp. 18–19.

3. Assuming petitioner's right to be present at the trial was one that could be waived, there was an insufficient inquiry to afford a basis for deciding the issue of waiver. P. 19.

4. Petitioner's due process rights would not be adequately protected by remanding the case for a psychiatric examination to determine whether he was in fact competent to stand trial in 1969, but the State is free to retry him, assuming that at the time of such trial he is competent to be tried. P. 20.

498 S. W. 2d 838, reversed and remanded.

BURGER C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-6038

James Edward Drope, Petitioner, *v.* State of Missouri. | On Writ of Certiorari to the Court of Appeals of Missouri for the St. Louis District.

[February 19, 1975]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to consider petitioner's claims that he was deprived of due process of law by the failure of the trial court to order a psychiatric examination with respect to his competence to stand trial and by the conduct in his absence of a portion of his trial on an indictment charging a capital offense.

I

In February 1969 an indictment was returned in the Circuit Court of St. Louis, Missouri, charging petitioner and two others with the forcible rape of petitioner's wife. Following severance of petitioner's case from those of the other defendants and a continuance, on May 27 his counsel filed a motion for a continuance until September, in order that petitioner might be examined and receive psychiatric treatment. Treatment had been suggested by a psychiatrist who had examined petitioner at his counsel's request and whose report was attached to the motion.[1] On the same date respondent, through the

[1] The motion recites: "Comes now the Defendant, JAMES E. DROPE, and states to the court that he had a psychiatric examina-

Assistant Circuit Attorney, filed a document stating that the State did not oppose the motion for a psychiatric examination. Apparently no action was taken on the motion, and petitioner's case was continued until June 23, at which time his counsel objected to proceeding with

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tion made by Dr. Joseph F. Shuman, M. D., a copy of which report is attached hereto.

"Defendant moves the court to continue his case until September 1969 in order that he might receive an Examination, Evaluation and psychiatric treatment, as suggested by Dr. Shuman, at the Malcomb Bliss Hospital in the City of St. Louis, Missouri."

The report, in the form of a letter to petitioner's attorney, states that the psychiatrist examined petitioner on February 20, 1969. In a section entitled "Past Medical History" it describes petitioner as "markedly agitated and upset," noting that he "appeared to be cooperative in this examination, but he had difficulty in participating well." The report continues: "The patient had a difficult time relating. He was markedly circumstantial and irrelevant in his speech . . . . There was no sign as to the presence of any delusions, illusions, hallucinations, obsessions, ideas of reference, compulsions or phobias at this time . . . . In a simple IQ exam Mr. Drope was able to achieve a score in the low normal range . . . . Mr. Drope was well oriented in all spheres. With much difficulty he was able to explain a few abstractions . . . . He was able, without trouble, to answer questions testing judgment. He had much difficulty even doing the simple counting and calculation problems." The report then recounts the details of a conversation between the psychiatrist and petitioner's wife. The latter admitted that she had left petitioner on a number of occasions because of his sexual perversions and described the "strange behavior" of petitioner, including falling down flights of stairs, as an attempt to gain sympathy from her. In a section entitled "Impression," the report states that petitioner had "always led a marginal existence," that he had a "history of anti-social conduct," but that there were no "strong signs of psychosis at this time." It concludes that petitioner "certainly needs the aid of a psychiatrist," and that he "is a very neurotic individual who is also depressed and perhaps he is depressed for most of the time," and it offers as diagnoses: "(1) Sociopathic personality disorder, sexual perversion. (2) Boderline mental deficiency. (3) Chronic Anxiety reaction with depression."

the trial on the ground that he had understood the case would be continued until September and consequently was not prepared. He objected further "for the reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial." The trial judge noted that the motion for a continuance was not in proper form and that, although petitioner's counsel had agreed to file another, he had failed to do so, and he overruled his objections and directed that the case proceed to trial.

On June 24 a jury was empaneled, and the prosecution called petitioner's wife as its first witness. She testified that petitioner participated with four of his acquaintances in forcibly raping her and subjecting her to other bizarre abuse and indignities, but that she had resumed living with him after the incident on the advice of petitioner's psychiatrist and so that their children would be taken care of. On cross-examination, she testified that she had told petitioner's attorney of her belief that her husband was sick and needed psychiatric care and that for these reasons she had signed a statement disavowing a desire to prosecute. She related that on several occasions when petitioner did not "get his way or [was] worried about something," he would roll down the stairs. She could explain such behavior only by relating "what they told him many times at City Hospital, that is something he does upon hisself [*sic*]." However, she also stated that she was not convinced petitioner was sick after talking to his psychiatrist, and that she had changed her mind about not wanting to prosecute petitioner because, as she testified, he had "tried to choke me, tried to kill me" on the Sunday evening prior to trial.

The prosecution called three more witnesses, but did not conclude its case before adjournment on June 24. The following morning, petitioner did not appear. When

the trial judge directed counsel to proceed, petitioner's attorney moved for a mistrial "in view of the fact that the defendant, I am informed, shot himself this morning." The trial judge denied the motion, stating that he had already decided the matter would proceed for trial, and when petitioner's counsel complained of the difficulty of proceeding without a client, the trial judge replied that the difficulty was brought about by petitioner, who was on bond and had a responsibility to be present. The prosecution then called four more witnesses and, after producing proof of a prior conviction,[2] rested its case. Petitioner's "Motion for Verdict of Acquittal," including in effect a renewal of the motion for a mistrial, was denied, and his counsel stated that he had "no evidence to produce at this time under the circumstances." The jury returned a verdict of guilty, and on July 21, 1969, petitioner, who had been in the hospital for three weeks recovering from a bullet wound in the abdomen, appeared, and the trial court fixed the penalty at life imprisonment.

Petitioner filed a motion for a new trial, the burden of which was that the trial court had erred in proceeding with the trial when no evidence had been produced that his absence from the trial was voluntary. A hearing was held before the judge who had presided at trial. Petitioner testified that on June 25 he had gone to his brother's house and that he remembered nothing concerning the shooting except that he felt a burning pain in his stomach and later woke up in the hospital. He testified he did not remember talking to anyone at the hospital. The State presented evidence that upon admission to the hospital petitioner stated that he had shot himself because of "some problem with the law," and that he had told a policeman he had shot himself because "he

[2] Petitioner was tried as a second offender under Mo. Rev. Stat. § 556.280 (1969), having been convicted in 1958 of second degree burglary and "stealing."

was supposed to go to court for rape, and he didn't do it; he rather be [*sic*] dead than go to trial for something he didn't do." The trial judge denied the motion. Stating that on the morning of petitioner's failure to appear he had received information on the telephone which was checked with the hospital, the judge concluded that petitioner had the burden of showing his absence was not voluntary and found on the basis of the evidence that his absence "was due to his own voluntary act in shooting himself; done for the very purpose of avoiding trial."

The Missouri Supreme Court affirmed, accepting the trial court's finding, in ruling on petitioner's motion for a new trial, that his absence was voluntary,[3] and holding that there was "no logical basis" for positing a different rule with respect to waiver of the right to be present in capital cases [4] than that which applies in felony cases generally. The Missouri Supreme Court also held that the denial of petitioner's motion for a continuance of the trial in order to procure further psychiatric evaluation was not an abuse of discretion, noting that petitioner did not contend that he lacked the mental capacity to proceed with the trial.

In April 1971 petitioner filed a motion to vacate the judgment of conviction and sentence in the court where sentence had been imposed, pursuant to Missouri Su-

[3] As to the situation at trial, the Missouri Supreme Court stated: "We disagree with defendant's contention that there is 'no evidence upon the record' that he voluntarily absented himself. The court made such a determination before proceeding with the trial, although the basis for that determination is not fully disclosed. However, when defendant is free on bond, and he does not appear at the appointed time, it is presumed that the absence is voluntary until established otherwise." *State* v. *Drope*, 462 S. W. 2d 677, 681 (Mo. 1971).

[4] At the time of petitioner's trial, rape was punishable by death under Mo. Rev. Stat. § 559.260 (1969), and respondent had not waived the death penalty.

preme Court Rule 27.26 (1969).[5] He alleged that his rights under Mo. Rev. Stat. § 552.020 (2) (1969)[6] and his constitutional rights had been violated by the failure to order a psychiatric examination prior to trial and by conducting the trial to conclusion in his absence. Petitioner also asserted that he had been denied the effective assistance of counsel, a claim which is not before us.

In July 1971 a hearing was held on the motion; petitioner called two psychiatrists as witnesses. The psychiatrist who had examined petitioner prior to his trial testified that in his opinion there was reasonable cause to believe that a person who atempted to commit suicide in the midst of a trial might not be mentally competent to understand the proceedings against him. Another psychiatrist, whose duties included the examination of accused persons under Mo. Rev. Stat., c. 552, testified that in his opinion a man who was charged with raping his wife and attempted suicide during his trial was in need of a psychiatric evaluation to find out his mental condition, and that there should be an evaluation to determine whether the person was competent to assist in his own defense and

[5] A petition for a writ of habeas corpus previously filed in the United States District Court for the Eastern District of Missouri had been dismissed without prejudice on April 1, 1971, for failure to exhaust available state remedies. See 28 U. S. C. § 2254 (b)–(c) (1970).

[6] Subdivision 2 of § 552.020 provides in pertinent part: "Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private physicians to make a psychiatric examination or shall direct the superintendent of a facility of the division of mental diseases to have the accused so examined by one or more physicians whom the superintendant shall designate." Subdivision 3 delineates the requirements for reports of psychiatric examinations, and subdivision 6 requires the court to hold a hearing if the opinion relative to fitness to proceed which is required to be included in the report is contested.

whether he was "malingering or did it intentionally or if it was due to a true psychiatric disorder." The same psychiatrist stated that he had examined petitioner at City Hospital in 1965 and had found that he had psychiatric problems and was in need of care. Petitioner took the stand, repeating his previous testimony with respect to the shooting.

In June 1972 the sentencing judge denied petitioner's Rule 27.26 motion, and the Missouri Court of Appeals affirmed. The Court of Appeals concluded that the provisions for psychiatric examinations and hearings under Mo. Rev. Stat. § 552.020 (1969) comported with the requirements of *Pate* v. *Robinson*, 383 U. S. 375 (1966), and that the test of incompetence to stand trial was that stated in *Dusky* v. *United States*, 362 U. S. 402 (1960).[7] It reasoned that it was necessary to examine the indicia of petitioner's incompetence "at three different times—before the trial, during the trial after the suicide attempt, and at the time of the motion for new trial."

As to the situation before trial, the court held that the psychiatric report attached to petitioner's motion for a continuance did not raise a reasonable doubt of his fitness to proceed. Turning to the second time period, "during the trial after the suicide attempt," the court held that *Pate* v. *Robinson*, 383 U. S. 375 (1966), which involved a competence hearing rather than a competence examination followed by a hearing, did not require that the examination and hearing be held during the trial rather than immediately thereafter. With regard to the period after trial, and accepting petitioner's contention that his was a "bona fide attempt at suicide," the court was

[7] "[T]he 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" See also Mo. Rev. Stat. § 552.020 (1) (1969).

e. g., United States v. *Knohl*, 379 F. 2d 427, 434–435 (CA2 1967), cert. denied, 389 U. S. 973 (1967); *United States ex rel. Evans* v. *LaVallee*, 446 F. 2d 782, 785–786 (CA2 1971), cert. denied, 404 U. S. 1020 (1972). Nor did the Court prescribe a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure.[9] Rather, it noted that under the Illinois statute a hearing was required where the evidence raised a "*bona fide* doubt" as to a defendant's competence, and the Court concluded "that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue." 383 U. S., at 385. See *United States* v. *Marshall*, 458 F. 2d 446, 450 (CA2 1972).

As was true of Illinois in *Robinson*, Missouri's statutory scheme "jealousy guards" a defendant's right to a fair trial. Mo. Rev. Stat. § 552.020 (1) (1969) provides: "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Section 552.020 (2) provides that a judge or magistrate shall, "upon his own motion or upon motion filed by the state or by or on behalf of the accused," order a psychiatric examination whenever he "has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed." Section 552.020 (3) prescribes the contents of a report of the psychiatric examination, and § 552.030 (6) requires

[9] In discussing the evidence adduced at Robinson's trial, the Court did, however, indicate that a history of irrational behavior is a relevant factor which, on the record before it, was sufficient to require further inquiry notwithstanding Robinson's demeanor at trial and the stipulated opinion of a psychiatrist that Robinson knew the nature of the charges against him and could cooperate with counsel when the psychiatrist examined him two or three months before. See *post*, at 17–18.

the court to hold a hearing if the opinion relative to fitness to proceed which is required to be included in the report is contested. In addition, the trial court may conduct a hearing on its own motion. Such a procedure is, on its face, constitutionally adequate to protect a defendant's right not to be tried while legally incompetent. Our task is to determine whether the proceedings in this case were consistent with petitioner's right to a fair trial.

At the outset we are met by respondent's argument that the Court is bound by "limitations placed on proceedings under" Missouri Supreme Court Rule 27.26. Specifically, respondent notes that under Rule 27.26 (f) petitioner had "the burden of establishing his grounds for relief by a preponderance of the evidence," and that the appellate review function of the Missouri Court of Appeals was limited by Rule 27.26 (j) "to a determination of whether the findings, conclusions and judgment of the trial court [were] clearly erroneous." It urges that the Rule was "designed . . . to provide a valuable post-conviction remedy and not to provide another direct appeal . . . ," and expresses concern that "the state-federal relationship . . . remain in proper balance."

We share respondent's concern for this necessary balance, and we do not question the State's power, in post-conviction proceedings, to reallocate the respective burdens of the individual and the State and to delimit the scope of state appellate review. Cf. *Hawk* v. *Olson*, 326 U. S. 271, 279 (1945); *Conner* v. *Wingo*, 429 F. 2d 630, 637–639 (CA6 1970). At the same time we note that while proceedings under the Rule "ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal," nevertheless "trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal." Missouri Supreme Court Rule 27.26 (b)(3) (1969).

In the present case there is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court prior to trial and thereafter. Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial. In such circumstances we believe it is "incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris* v. *Alabama*, 294 U. S. 587, 590 (1935).[10] "When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." *Hawk* v. *Olson*, 326 U. S., at 276.

III

The sentencing judge and the Missouri Court of Appeals concluded that the psychiatric evaluation of petitioner attached to his pretrial motion for a continuance did not contain sufficient indicia of incompetence to stand trial to require further inquiry. Both courts mentioned aspects of the report suggesting competence.

[10] "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct, or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication . . . . Especially in cases arising under the Due Process Clause it is important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits . . . ." *Watts* v. *Indiana*, 338 U. S. 49, 51 (1949) (Opinion of Frankfurter, J.). See also *Culombe* v. *Connecticut*, 367 U. S. 568, 605 (1961) (Opinion of Frankfurter, J.).

such as the impressions that petitioner did not have "any delusions, illusions, hallucinations . . . ," was "well oriented in all spheres," and "was able, without trouble, to answer questions testing judgment," but neither court mentioned the contrary data. The report also showed that petitioner, although cooperative in the examination, "had difficulty in participating well." "had a difficult time relating," and that he "was markedly circumstantial and irrelevant in his speech." In addition, neither court felt that petitioner's episodic irrational acts described in the report or the psychiatrist's diagnoses of "borderline mental deficiency" and "chronic anxiety reaction with depression" created a sufficient doubt of competence to require further inquiry.[11]

It does not appear that the examining psychiatrist was asked to address himself to medical facts bearing specifically on the issue of petitioner's competence to stand trial, as distinguished from his mental and emotional condition generally. Thus, it is not surprising that before this Court the dispute centers on the inferences that could or should properly have been drawn from the report. Even where the issue is in focus we have recognized "the uncertainty of diagnosis in this field and the tentativeness of professional judgment." *Greenwood* v. *United States*, 350 U. S. 366, 375 (1956). Here the inquiry is rendered more difficult by the fact that a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies. See *Jackson* v. *Indiana*, 406 U. S. 715, 739 (1972); *Pate* v. *Robinson*, 383 U. S. 375, 388–389 (1966) (Harlan, J., dissenting);

[11] See n. 1, *supra*. The Court of Appeals determined that the other diagnosis offered, "sociopathic personality disorder, sexual perversion," was excluded as a "mental disease or defect" under Missiouri law. See Mo. Rev. Stat. § 552.010 (1969).

Weihofen, "The Definition of Mental Illness," 21 Ohio St. L. J. 1 (1960).

Like the report itself, the motion for a continuance did not clearly suggest that petitioner's competence to stand trial was the question sought to be resolved. While we have expressed doubt that the right to further inquiry upon the question can be waived, see *Pate* v. *Robinson*, 383 U. S., at 384, it is nevertheless true that judges must depend to some extent on counsel to bring issues into focus. Petitioner's somewhat inartfully drawn motion for a continuance probably fell short of appropriate assistance to the trial court in that regard. However, we are constrained to disagree with the sentencing judge that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial," did not raise the issue of petitioner's competence to stand trial.[12] This statement also may have tended to blur the aspect of petitioner's mental condition which would bear on his criminal responsibility and that which would bear on his competence to stand trial. However, at that stage, and with the obvious advantages of hindsight, it seems to us that it would have been, at the very least, the better practice to order an immediate examination under Mo. Rev. Code § 552.020 (2) (1969).[13] It

[12] In a colloquy with the trial judge, petitioner's counsel noted that the examination and evaluation "could be done during the summer months and be ready for the trial *or else the examination would eliminate trial by September.*" (Emphasis added.)

[13] The sentencing judge observed that "motions for psychiatric examinations have often been made for the purpose of delay," and "estimated that almost seventy-five percent of those sent for psychiatric examination are returned mentally competent." Although we do not of course suggest that courts must accept without question a lawyer's representations concerning the competence of his client, see *United States ex rel. Rizzi* v. *Follette*, 367 F. 2d 559, 561 (CA2 1966), an expressed doubt in that regard by one with "the closest

is unnecessary for us to decide whether such examination was constitutionally required on the basis of what was then known to the trial court since in our view the question was settled by later events.

IV

Turning to the situation at petitioner's trial, the state courts viewed the evidence as failing to show that during trial petitioner had acted in a manner that would cause the trial court to doubt his competence. The testimony of petitioner's wife, some of which repeated and confirmed information contained in the psychiatric evaluation attached to petitioner's motion for a continuance, was given little weight.[14] Finally, the sentencing judge,

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contact with the defendant," *Pate* v. *Robinson*, 375 U. S., at 391 (Harlan, J., dissenting), is unquestionably a factor which should be considered. Moreover, resolution of the issue of competence to stand trial at an early date best serves both the interests of fairness, see *Peyton* v. *Rowe*, 391 U. S. 54, 62 (1968), and of sound judicial administration. See Panel on Recognizing and Determining Mental Competency to Stand Trial—Insanity as a Defense, 37 F. R. D. 155, 161 (1964). Realization of those facts may have prompted the practice, noted by the sentencing court, "of the Circuit Attorney at the time to consent in all cases to a psychiatric examination whether with or without merit and without looking into the matter further."

[14] See n. 1, *supra*. The sentencing court noted: "She did testify in answer to the question 'And at that time didn't you tell me that you felt your husband was sick and needed psychiatric care?' The answer 'Yes.' There was also some evidence of disputes and trouble accompanied by some physical force between husband and wife but not to the extent to indicate inability to understand the proceedings. There was no recitation of facts upon which a layman could base the opinion that the defendant was insane except the testimony perhaps that he rolled down the steps but this occurred only two or three times over a period of eight to nine or ten years." The Court of Appeals dealt with her testimony only insofar as it repeated information in the psychiatric evaluation. It concluded that her feelings that petitioner had mental problems "bore on his sexual perver-

relying on his finding on petitioner's motion for a new trial and although stating "that it does not take a psychiatrist to know that such a man has a problem and indicates poor judgment," concluded that the "fact that Mr. Drope shot himself to avoid trial suggests very strongly an awareness of what was going on." The Court of Appeals, accepting *arguendo* petitioner's contention that his was "a bona fide attempt at suicide," refused to conclude "that as a matter of law an attempt at suicide creates a reasonable doubt as to the movant's competency to stand trial."

Notwithstanding the difficulty of making evaluations of the kind required in these circumstances, we conclude that the record reveals a failure to give proper weight to the information suggesting incompetence which came to light during trial. This is particularly so when viewed in the context of the events surrounding petitioner's suicide attempt and against the background of the pretrial showing. Although a defendant's demeanor during trial may be such as to obviate "the need for extensive reliance on psychiatric prediction concerning his capabilities," Note, *supra*, at 469, we concluded in *Pate* v. *Robinson*, 383 U. S., at 385–386, that "this reasoning offers no justification for ignoring the uncontradicted testimony of . . . [a] history of pronounced irrational behavior." We do not mean to suggest that the indicia of such behavior in this case approximated those in *Robinson*, but we believe the Missouri courts failed to consider and give proper weight to the record evidence. Too little weight was given to the testimony of petitioner's wife that on the Sunday prior to trial he tried to choke her to death. For a man whose fate depended in large measure on the indulgence of his

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sions—not his competency," and that the stairs episodes "demonstrate[d] pique more than anything."

wife, who had hesitated about pressing the prosecution, this hardly could be regarded as rational conduct.[15] Moreover, in considering the indicia of petitioner's incompetence separately, the state courts gave insufficient attention to the aggregate of those indicia in applying the objective standard of Mo. Rev. Stat. § 552.020 (2). We need not address the Court of Appeals' conclusion that an attempt to commit suicide does not create a reasonable doubt of competence to stand trial as a matter of law. As was true of the psychiatric evaluation, petitioner's attempt to commit suicide "did not stand alone." *Moore* v. *United States*, 464 F. 2d 663, 666 (CA9 1972). We conclude that when considered together with the information available prior to trial and the testimony of petitioner's wife at trial, the information concerning petitioner's suicide attempt created a sufficient doubt of his competence to stand trial so as to require further inquiry on the question.

The import of our decision in *Pate* v. *Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifesta-

[15] It appears that under Mo. Rev. Stat. § 546.260 (1969) petitioner's wife could not be compelled to testify against him. See *State* v. *Dunbar*, 360 Mo. 788, 230 S. W. 2d 845 (1950). Similarly, neither court mentioned Mrs. Drope's testimony concerning petitioner's consultations at City Hospital. At the Rule 27.26 hearing, it will be recalled, a psychiatrist testified that he had examined petitioner at City Hospital in 1965 and had determined that he was in need of psychiatric care.

tions and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Here, the evidence of irrational behavior prior to trial was weaker than in *Robinson*, but there was no opinion evidence as to petitioner's competence to stand trial. See n. 9, *supra*. Moreover, Robinson was present throughout his trial; petitioner was absent for a crucial portion of his trial. Petitioner's absence bears on the analysis in two ways: first, it was due to an act which suggests a rather substantial degree of mental instability contemporaneous with the trial, see *Pate* v. *Robinson*, 383 U. S., at 389 (Harlan, J., dissenting); [16] second, as a result of petitioner's absence the trial judge and defense counsel were no longer able to observe him in the context of the trial and to guage from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him.

Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. Whatever the relationship between mental

[16] We assume, as did the Missouri Court of Appeals, that petitioner's was a "bona fide" suicide attempt, rather than, as respondent contends, malingering. In that regard, the hearsay information in the possession of the trial judge when he denied the motion for a mistrial suggested an intent on the part of petitioner to kill himself, and a self-inflicted wound near vital organs does not suggest malingering. Of course we also recognize that "the empirical relationship between mental illness and suicide" or suicide attempts is uncertain and that a suicide attempt need not always signal "an inability to perceive reality accurately, to reason logically and to make plans and carry them out in an organized fashion." Greenburg, "Involuntary Psychiatric Commitments to Prevent Suicide," 49 N. Y. U. L. Rev. 227, 234, 236 (1974). See also Pokorny, "Myths about Suicide," in Suicidal Behaviors 64–65 (Resnick, ed. 1968).

illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his suicide attempt, and there being no opportunity without his presence to evaluate that bearing in fact, the correct course was to suspend the trial until such an evaluation could be made.[17] That this might have aborted the trial is a hard reality, but we cannot fail to note that such a result might have been avoided by prompt psychiatric examination before trial, when it was sought by petitioner.

V

Our resolution of the first issue raised by petitioner makes it unnecessary to decide whether, as he contends, it was constitutionally impermissible to conduct the remainder of his trial on a capital offense in his enforced absence from a self-inflicted wound. See *Diaz* v. *United States*, 223 U. S. 442, 445 (1912). However, even assuming the right to be present was one that could be waived, what we have already said makes it clear that there was an insufficient inquiry to afford a basis for deciding the issue of waiver. Cf. *Westbrook* v. *Arizona*, 384 U. S. 150 (1966); *United States* v. *Silva*, 418 F. 2d 328 (CA2 1969).

The Missouri Court of Appeals concluded that, had further inquiry into petitioner's competence to stand trial been constitutionally mandated in this case, it would have been permissible to defer it until the trial had been completed. Such a procedure may have advantages, at least where the defendant is present at the trial and the appropriate inquiry is implemented with dispatch. See

[17] In reaching this conclusion we have not relied on the testimony of the psychiatrists at the Rule 27.26 hearing, which, we agree with the Missouri Court of Appeals, is not relevant to the question before us.

Note, *supra*, at 469; *Hansford* v. *United States*, — U. S. App. D. C. —, 384 F. 2d 311, 312 (1966) (rehearing en banc denied) (Statement of Leventhal, J.); *Jackson* v. *Indiana*, 406 U. S. 715, 741 (1972). However, because of petitioner's absence during a critical stage of his trial, neither the judge nor counsel was able to observe him, and the hearing on his motion for a new trial, held approximately three months after the trial, was not informed by an inquiry into either his competence to stand trial or his capacity effectively to waive his right to be present.

The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, see *Pate* v. *Robinson*, 383 U. S. 375, 386–387 (1966); *Dusky* v. *United States*, 362 U. S. 402 (1960), we cannot conclude that such a procedure would be adequate here. Compare *Conner* v. *Wingo*, 429 F. 2d 630, 639–640 (CA6 1970). The State is free to retry petitioner, assuming, of course, that at the time of such trial he is competent to be tried.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.